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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

Estate of SHELTON A. McHENRY,

*Deceased.*

EDWARD S. HALL, *et al.*,

*Petitioners,*

v.

THOMAS E. O'SULLIVAN, *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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## QUESTIONS PRESENTED

In California, as in many states, a presumption of undue influence and constructive fraud arises when an attorney who has drafted a will is named as a major beneficiary. Because the exercise of undue influence by attorneys is deemed especially egregious, the presumption is a strong one and courts are directed to give cases where it arises "the closest scrutiny." Thus, not only does the attorney have the burden to overcome the presumption, but, the burden of proof is heavier than that which normally obtains in civil litigation: the attorney must offer "the clearest and most satisfactory evidence" that he did not unduly influence the client and that no advantage was taken by him, that he performed with "the most perfect good faith," and that the client was fully informed of all relevant matters and so was placed as to be able to act

understandingly and to deal with the attorney at arm's length.

Relatives and friends of a decedent whose will left a substantial portion of his estate to the attorney who prepared it obviously have a strong interest in trying to prove the attorney's overreaching, and should have all the leeway that the Constitution allows and requires under its guarantee of procedural Due Process to do so. The questions for this Court involve, first, whether Due Process is satisfied where, as here, contestants are prohibited from showing through circumstantial evidence that, as a result of his conflict in interest, the attorney abrogated his professional responsibilities to the decedent and took unfair advantage of him.

The second question concerns the standard for appellate review of a finding that the attorney has overcome the

presumption of undue influence. Specifically, to protect the public by truly enforcing Due Process, we urge the Court to decide whether the "substantial evidence" standard employed by the California Court was adequate to protect against misapplication of both the standard of "clearest and most satisfactory evidence" and the requirement that the attorney's conduct be subjected to "closest scrutiny," or whether an augmented standard of review is warranted under the Due Process clause and to protect the integrity of the bar.

**PARTIES TO THE PROCEEDINGS**

The parties to the proceedings below were: Contestants Edward S. Hall and William Dean Mills; Respondents Thomas E. O'Sullivan and John T. Lynch.

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**PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL**

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**OPINIONS BELOW**

The decision of the Court of Appeal affirming the trial court's finding that there was no undue influence is not officially reported; the opinion is reprinted in Appendix A hereto ("App. A") at 1a-35a. The prior opinion of the Court of Appeal remanding for a hearing and

counseling the strictest of scrutiny is reprinted App. B, 36a-58a. The order granting in part and denying in part rehearing is at App. C, 59a-60a. The Order of the California Supreme Court denying review is at App. D, 61-a.

**JURISDICTION**

The unpublished decision and Order of the California Court of Appeal affirming the judgment was entered on May 19, 1994 (App. A. 1a-35a). A motion for rehearing was denied on June 14, 1994 (App. C, 59a). A timely Petition to the California Supreme Court for Review was denied on July 27, 1994 (App. D, 61a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. By Order of Justice Sandra Day O'Connor (App. E, 62a), the time to file a petition for Certiorari was extended to November 24, 1994. Because that is Thanksgiving day, the

Petition is due November 25, 1994.

**CONSTITUTIONAL PROVISION**

The fourteenth amendment to the United States Constitution provides in pertinent part:

> . . . [N]or shall any State deprive any person of life, liberty, or property without due process of law . . .

**STATEMENT OF THE CASE**

Petitioners, Edward S. Hall and William Dean Mills are relatives of Shelton A. McHenry, a wealthy Southern California restaurateur who died in 1987. Hall and Mills contested the probate of McHenry's 1984 will and 1985 codicil in which one half of the substantial residue of his multi-million dollar estate was left to the attorney who drafted the will, respondent Thomas O'Sullivan, and the other half to McHenry's former business manager, John Lynch.

The petition for revocation of probate charged, inter alia, fraud and undue influence by O'Sullivan and Lynch in procuring the residuary clause. Though the petition was initially denied based on its being filed one day late, the California Court of Appeal (Unpublished Opinion, Nov. 20, 1991 (App. B, 36a)) pointed to evidence of extrinsic fraud by O'Sullivan in persuading the legatees not to timely contest the will. Mindful that courts must be "particularly vigilant where the alleged impropriety is by an attorney" (54a), the appellate court reversed and remanded so that the probate court could exercise its equitable jurisdiction in further proceedings.

Noting undisputed facts that should have alerted the probate court to investigate further (that "counsel for decedent drafted the will and placed

himself as co-executor; called employees from his office to witness the will although decedent's employees were available; and became the beneficiary of half the substantial residue of decedent's estate"), and the special responsibility of the courts to protect against unprincipled attorneys, the Court of Appeals wrote that the need to protect against fraud is so great that a court should sua sponte raise any issue of fraud and afford the closest of scrutiny. As the Court put it (a.54 (emphasis added)):

> Where the alleged undue influence is by the attorney who drafted the will and takes a substantial sum of the estate, "such bequest invites invocation of the evidentiary presumption of undue influence ..." (Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430) In such instances, even if the contestant cannot prove standing, when "it is plain" that the attorney "drafted the will in which he is named as executor and as a major beneficiary, the probate court

> may upon its own motion raise the presumption of undue influence and require [the attorney] to rebut the presumption. [Citations omitted] In such cases of possible abuse of the confidential relationship by attorneys, the probate court should raise the presumption sua sponte. Such exercise of undue influence by attorneys are especially egregious and thus require the closest scrutiny. [Citations omitted]"

When the matter returned to the trial court, that court perceived that the procedural posture of the case as well as contestants' pleadings and concessions in this and other related actions significantly circumscribed its mission. It reasoned that the sole issue for its determination was whether the 1984 residuary clause and 1985 codicil were procured by undue influence or fraud on the part of O'Sullivan or Lynch. Since the attorney's drafting of the will and taking of a substantial bequest had raised

a presumption of undue influence -- and the burden was, therefore, on the attorney to rebut the presumption -- the trial began with O'Sullivan's evidence.

However, as shown below, though O'Sullivan's necessarily self-serving testimony should have been viewed with healthy skepticism, the judge gave the attorney unusual deference: O'Sullivan was permitted to present the bulk of his "testimony" as to the "facts" of his confidential interactions with Mr. and Mrs. McHenry over a course of years in the form of a 31-page declaration; then, over objection, he was allowed to give his "opinion" as to the "patterns" those "facts" reflected.

Even though drastically changed circumstances (the death of his wife of 55 years, his recent remarriage and contemplated annulment, the sale of some

of his businesses, his suffering of a stroke, heart attack and degenerative eye disease, his dependence on round the clock care) put the continuation of any such "patterns" in question and demanded careful counseling and advice by any ethical and prudent counsel asked to prepare a will in 1984 (and, in particular, one who stood to inherit nearly half of the estate), these earlier "patterns" were ultimately adopted wholesale by the court and relied upon by it to find both that counsel O'Sullivan had acted in good faith and that McHenry was fully informed when he executed his will in 1984, when, in fact, O'Sullivan not only failed to discuss his conflict of interest at that time, but, according to his own testimony, sat idly by and gave no professional advice whatsoever.

Though the policy reason for creating

an especially strong presumption of undue influence in cases of this sort emanates from the concern that the attorney's interest in being a beneficiary might impair his independent and untrammeled judgment and advice, the court refused to find that either the attorney's confessed passivity or the poor quality of the advice he rendered was the least bit relevant in determining whether the presumption of undue influence had been rebutted. As the court kept repeating, "This isn't a malpractice action."

Similarly, even though the one-on-one interactions with the decedent reported by the attorney were, by definition, incapable of direct contradiction, the court refused to find relevance in conduct by both McHenry and O'Sullivan circumstantially contradicting O'Sullivan's version of events and which

suggested over-reaching on his part or circumstantially indicated his consciousness of impropriety. In the court's view, if the conduct did not directly show fraud or affirmative persuasion by O'Sullivan in 1984 or his confession or admission to such behavior, it too was irrelevant.

The Evidence: In live testimony and a 31-page declaration, O'Sullivan proffered that he had been McHenry's attorney for over 30 years. A tax and estate planning specialist, he joined the law firm of Todd Johnson in 1955; Johnson had been doing McHenry's legal work since 1938 or 1939. After 1955, O'Sullivan and his office continued doing all of McHenry's legal work until McHenry's death in 1987.

Sullivan began estate planning for McHenry and his first wife, Bernice, in 1960. During the period O'Sullivan worked

for them, the McHenrys had prepared "in the neighborhood" of 12 wills or codicils. Until Bernice passed away, the McHenrys wrote reciprocal wills in which each spouse left his or her estate to the surviving spouse. The McHenrys had no children and, when Bernice died in 1983, introduced and O'Sullivan offered his opinion (over objection) as to the "pattern" of testamentary philosophy that they reflected.

According to Sullivan, the McHenrys' wills reflected a "very consistent" pattern of leaving cash bequests to relatives, personal property to friends, and the residue to current "employees and professionals." When a person left the McHenrys' employ, the "general practice was to take them out of the will." O'Sullivan insisted that he played no part in assisting the McHenry's to form that

philosophy. (And he certainly did nothing to dissuade him from it.)

In a number of wills O'Sullivan had prepared for the McHenrys before Todd Johnson's death in 1971, this attorney had been named as a beneficiary of 5% of the residue. Sometime after he began doing the McHenrys' estate work, O'Sullivan was named a contingent beneficiary of Johnson's share. Thereafter, he became a non-contingent residuary beneficiary and his interest increased. O'Sullivan did not recall whether this was done on the instruction of Mr. or Mrs. McHenry.

(O'Sullivan's trial testimony was inconsistent with the documentary evidence he introduced. According to his trial testimony, he had been a contingent beneficiary with a potential 5% interest in the residue some time in the 1960's and was first named a non-contingent

beneficiary in 1971; his interest was increased from 5% to 10% at that time. However, trial exhibits showed he became a non-contingent legatee under the will of March 1, 1965, and had a 5% interest in the residue; his percentage share stayed the same in a 1967 will, and then increased to 14% in 1969; it fluctuated between 15% and 16.5% in wills of 1971, 1972, 1975 and 1976. Then, it jumped to 50% in 1981 where it stayed in 1984. 1981 was not only the first time that his share increased dramatically, it was also the first time that the McHenrys' wills did not contain the express condition that, to enjoy the bequest, the legatee had to have been in the McHenrys' employ at the time of their death.

Though he was certain he did not suggest to the McHenrys that they make a bequest to him (or to anyone else) or that

they change the amount of the bequest, O'Sullivan was exceedingly vague about what he did tell them -- and when he told them. Importantly, he did not advise, insist, urge, or even suggest to the McHenrys that they seek outside counsel, and there was no evidence that he advised them as to the possible effect of being a beneficiary on the exercise of his professional judgment; he simply asked them at some unspecified time or times if they wanted other counsel and relied on statements of Todd Johnson that they did not. Moreover, by the time his share in the residuary dramatically increased to 50% in 1981, he had apparently already discontinued any discussion whatsoever about his potential conflict.

Thus, in his declaration, O'Sullivan asserted:

> When I saw that McHenry

intended to make Johnson a contingent co-residuary legatee of 10 percent of the residue of his estate, I asked Johnson whether or not we should have McHenry's will prepared by another attorney.

Johnson informed me that he had previously discussed this matter with McHenry and that McHenry did not want any other law firm doing his legal work, particularly his will, which he considered quite personal.

* * *

I had conversations to the same effect with McHenry and Bernice, in which we discussed the issue of potential conflicts of interest.

I believe, but do not specifically recall, that I had such a conversation with them in connection with the 1960 will, in which I was not a beneficiary.

I am sure that I had such conversations again in connection with later wills, in which I was a named beneficiary.

Based on my discussions with Johnson and the McHenrys . . . , I proceeded with the preparation of the McHenry's 1960 will.

> McHenrys had very strong opinions as to how their estate was to be divided and as to who they wanted to prepare their wills.
>
> After a number of years of preparing different iterations of the McHenrys' wills and the McHenrys' continued expression of strong feelings about the distribution of their estate, the issue of conflict of interest was no longer addressed.

O'Sullivan explained that, "generally," when a new will or codicil was to be prepared, he received written instructions from Mr. and/or Mrs. McHenry. The "bulk" of the instructions were given by Mrs. McHenry, "with some additions by Mr. McHenry." Again, over objection, O'Sullivan was permitted to offer his opinion that, in comparison with other clients, the McHenrys were the "most detailed, meticulous, intense people in giving instructions."

O'Sullivan, whose relationship with

the McHenrys was strictly professional (he never socialized with them), insisted that he never made any suggestions about any of the changes in the will, but passively accepted whatever changes he was given. Notwithstanding any prior *pattern*, as for the 1984 will in issue, O'Sullivan's passive conduct was especially suspicious and disturbing given the many changed circumstances in Shelton McHenry's life and McHenry's expressions to others.

As noted, McHenry's wife of 55 years, Bernice, died in 1983. Shortly thereafter, McHenry married Ruth Tullis. Soon after that, he began to suffer a series of serious medical problems. He had a stroke and a heart attack in the spring of 1984 and suffered from a degenerative eye disease that gravely impaired his vision. He was hospitalized in May, 1984, and, when he was released in

mid-May, had round the clock nurses and depended on the help of a chauffeur to move around. At the same time, he was actively involved in selling off his restaurant and real estate interests.

The will at issue was executed on May 23, 1984, soon after McHenry's release from the hospital. O'Sullivan could not recall if he had spoken to McHenry while he was in the hospital, but claimed that he had visited him at home shortly before the execution of the will.

At that time, according to O'Sullivan, McHenry provided him with a copy of his 1981 will and instructed him as to changes, the most significant of which was a $500,000 gift to his new wife Ruth. O'Sullivan claimed he wrote these changes on the 1981 copy -- though, suspiciously, at this critical time O'Sullivan could not locate the copy or

any other notes indicating changes.

The death of McHenry's first wife and his remarriage, as well as the sale of certain restaurants, obviously suggested an array of never-before considered estate and tax planning issues. O'Sullivan, however, maintained that he did not render any advice or, indeed, ask McHenry a single question about his 1984 estate plan: he simply passively recorded the changes supposedly given by McHenry. He did not suggest that McHenry consult another lawyer or even bring up the topic of his potential conflict.

O'Sullivan prepared the will within a few days of their meeting and then returned to McHenry's home for its execution. In private once again, he supposedly went over the will with McHenry who made one change, and then -- though McHenry's nurse and chauffeur were at home

-- called his office for two employees to come to McHenry's home to witness the signing. According to O'Sullivan, McHenry was very private and "always" expressed his preference for having O'Sullivan personally handle his legal matters. As far as he knew, he and McHenry were the only people who knew the contents of McHenry's 1984 will.

In essence, then, it was O'Sullivan's position that (1) McHenry had an immutable estate plan in which trusted employees and professionals were to receive the residue; (2) not only was McHenry meticulous in detail, but he was not interested in any advice or counseling, or, indeed, subject to any influence from his attorney; (3) McHenry trusted and confided in O'Sullivan alone to do his legal work; and, (4) when he revised his will in 1984, called upon O'Sullivan simply to act as scrivener.

Contestants Hall and Mills attempted a two-fold attack on this position. First, they argued that, even if O'Sullivan's portrayal were accepted, this was insufficient to overcome the presumption of undue influence and invalidity of the residuary clause: O'Sullivan's conflict of interest resulted in the complete suspension of any independent professional judgment on behalf of McHenry and there was no showing that in 1984 (or ever) McHenry was fully aware of this possible effect on O'Sullivan's performance.

The contestants also proffered refuting evidence to show that McHenry was not as "consistent" or resolute in his estate plans, no longer meticulous in detail, or as independent of or trusting in counsel as portrayed by O'Sullivan, and, therefore, that he depended on

O'Sullivan for undivided professional advice and judgment.

They also proffered evidence to show that O'Sullivan subverted McHenry's wishes by putting things in the will that McHenry did not and, since he was blind, could not see, and that O'Sullivan subsequently acted in a way that strongly suggested he was aware that he took advantage of his professional relationship to remain a 50% beneficiary under the 1984 will -- that he subsequently acted in a way that showed, if you will, a consciousness of impropriety. The court, however, did not accept the relevance of this evidence.

Thus, contestants presented evidence that days before the execution of the 1984 will, McHenry had told his clergyman that he planned to annul his marriage to Ruth Tullis and intended to leave his chauffeur Terry Gillard $300,000. (Gillard, a

trusted employee was left only a specific bequest of $10,000 in the 1984 will and no share in the residue.) McHenry's stated plan to "take care of" Gillard was confirmed by several other witnesses.

Also, at the same time that, according to O'Sullivan, McHenry was instructing him about the 1984 will, McHenry's nurse and chauffeur overheard McHenry tell O'Sullivan that he wanted to get back the jewelry he had given to Ruth. These and other witnesses also testified that around the same time, McHenry had expressed his distaste for and reservations about O'Sullivan.

And, contrary to McHenry's prior "patterns" of attention to detail and revision of his will when significant changes in his family and employment relationships occurred, McHenry -- according to O'Sullivan -- now did not

change his will in contemplation of his marriage to Ruth, and filed for divorce from her just two weeks after the execution of the 1984 will in which she was named as a major beneficiary.

(O'Sullivan's reported conduct in connection with the 1984 will -- his supposed failure to ask any questions or render any advice -- becomes even more questionable in light of this closely ensuing divorce action. O'Sullivan tried to justify his failure to ask questions of McHenry relating to his second marriage by claiming that he did not learn of McHenry's intent to file for divorce until after the will had been executed. McHenry's minister contradicted this, however, by testifying that, at McHenry's direction, he had telephoned O'Sullivan from McHenry's hospital room weeks before the will was prepared and heard McHenry

tell the attorney of his desire to annul his marriage.

Additionally, as for McHenry's purported custom to have only O'Sullivan handle McHenry's legal affairs, not only did O'Sullivan claim that he did not personally work on the divorce papers, but McHenry executed a 1985 codicil to his will and revoked the $500,000 bequest to Ruth without O'Sullivan's assistance; this, according to O'Sullivan, the only testamentary document prepared by McHenry without his assistance during the entire 30-year-period he worked for McHenry.)

Lastly, contestants proffered evidence that, after McHenry's death, O'Sullivan had "wined and dined" McHenry's cousin, Beatrice Moorman, to keep her from contesting the will and then offered her some crystal if she would sign a paper against her own attorney. The court

refused to consider this evidence or any evidence at all about O'Sullivan's conduct after McHenry's death in 1987. As far as the court was concerned, the only kind of evidence it would consider probative to counter the attorney's self-serving evidence was "an admission" or "confession" by O'Sullivan that he had defrauded McHenry.

Contestants argued to the California Court of Appeal, in essence, that the standard of proof required in connection with an inquiry into undue influence, where those who would take under a will but for an attorney's being made a beneficiary -- an inquiry important enough that courts must raise it sua sponte -- cannot be deemed satisfied by the type of proof allowed in this case, and that the Court erred in disallowing evidence broadly showing overreaching. As

Contestants put it(Opening Brief to Court of Appeal, p.25):

> The courts' sua sponte duty to inquire into such wills will be eviscerated if an attorney can protect his bequest by testifying that he merely passively accepted it and did not actually suggest that the testator give him something, and by producing witnesses to testify that they saw no fraud or undue influence performed in front of them. O'Sullivan should be held to the requirement of producing ⁑the clearest and most satisfactory⁑ evidence to rebut the presumption [of undue influence].

When the California Court of Appeal affirmed on this sorry record, petitioners sought rehearing and argued that the disallowance of evidence to rebut the presumption of undue influence, and the type of evidence accepted as rebutting the presumption in the first place, constituted a denial of Due Process (Petition for Rehearing p.3).

The Court of Appeal upheld the trial court's determination that O'Sullivan had rebutted the presumption of undue influence because, it said repeatedly, there was "substantial evidence" before the Court.

Contestants argued to the California Supreme Court that the evidence was not "substantial", that evidence of the nature accepted by the court could not have satisfied the heavy burden an attorney properly carries to rebut the presumption of undue influence, that the trial court had unfairly cut off their right to present evidence and had improperly refused to consider circumstantial evidence, and that they were "entitled to procedural due process, in that they were entitled to a fair hearing, as mandated by the Constitution" but were not afforded such process (Petition for Review p.23).

## REASONS FOR GRANTING THE WRIT

### This Court Should Grant The Writ To Assure Public Confidence In The Bar And To Protect The Due Process Rights Of Those Challenging Over-Reaching By Attorneys

This Court has recognized in cases as varied as Young v. U.S. ex rel Vuitton et Fils S.A., 481 U.S. 787 (1987), and Cuyler v. Sullivan, 446 U.S. 355 (1980), that any time an attorney has a conflict of interest, there is a significant possibility that his or her professional judgment will be compromised. Where the conflict arises from being the beneficiary of a will that the attorney prepared, State courts are particularly concerned.

The need for a lawyer of independence and undivided loyalty to the testator has been continually emphasized. Indeed, a conflict on the part of an attorney in a testimonial situation is considered so fraught with the danger of compromised

judgment and a high potential for undue influence that a presumption of improper influence has been widely recognized. In re Estate of Witt, 198 Cal. 407 (1926); Haynes v. First Natl. State Bank of New Jersey, 87 N.J. 163 (1981); Park v. George, 282 Ark. 155 (1984); Dial v. Walker, 328 Ill. 56 (1927); Donovan v. Bromley, 113 Mich. 53 (1897); St. Leger's Appeal, 34 Conn. 434 (1867); Barkley v. Barkley Cemetery Assoc., 153 Mo. 300 (1899); In re Guidi's Will, 259 App. Div. 652, aff'd. 284 N.Y. 680 (1940); In re Estate of Reid, 138 So.2d 342 (1962 Fla. App.); In re Lobb's Will, 177 Or. 162 (1945); In re Swan's Estate, 4 Utah 277 (1956); In re Spenner's Estate, 167 Wis. 2d 645 (1962).

Rebutting the presumption generally entails more than simply showing that the testator was of firm mind and resolve and

that the testamentary disposition represented his or her actual intent. Rather, it requires a showing that, in essence, there has been a knowing and voluntary waiver of the attorney's conflict of interest by the client: there must be a showing of a candid and full disclosure by the attorney so that the client can intelligently determine whether to continue to rely on the services of the attorney or seek independent counsel. See, e.g., In re Estate of Witt, 198 Cal. 407, 409 (1926); In re Blake's Will, 21 N.J. 50, 58-59 (1956).

This notion -- that a client must be apprised of the various risks and pitfalls and only then can decide to hazard those dangers -- is deeply embedded in the Code of Professional Responsibility. According to Canon 5, Ethical Consideration 5-5 of the Model Code of Professional

Responsibility:

> A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts such a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficiary be prepared by another lawyer selected by the client.

In this case, the trial court improperly deemed the attorney's self-serving evidence as to the testator's resolve and intent sufficient to overcome the presumption of undue influence, and, once the presumption was lifted, apparently regarded as relevant only direct evidence that McHenry was actively

dominated by O'Sullivan. It thus prohibited contestants from showing through circumstantial evidence that, as a result of his conflict in interest, the attorney abrogated his professional responsibilities to the decedent and, in that way, took unfair advantage of him.

At every turn, the court took a misguided view of what was relevant. It deemed it irrelevant that the attorney suspended all professional counsel, that he asked no questions and gave no advice (because "this isn't a malpractice action), and that O'Sullivan subsequently acted in a way that suggested he was aware that he had taken advantage of his professional relationship to remain a 50% beneficiary under the 1984 will. Indeed, the court even found evidence of forgery on the will irrelevant.

While any one of these evidentiary

rulings alone might not have resulted in the denial of Due Process, in the aggregate they worked to deprive contestants of the opportunity to show impropriety and over-reaching.

The strong presumption of undue influence, the heavy burden of proof, the requirement that the court closely scrutinize the dealings between a testator and an attorney who benefits from the testator's will all serve the public policy in favor of the security of those who entrust themselves or their property to the administration of others. Estate of Gelonese, 36 Cal. App. 3d 854, 862 (1974). By failing to give the attorney's conduct the "closest scrutiny," by finding that the presumption of undue influence had been overcome without the "clearest and most satisfactory" evidence that the testator had been fully apprised of the

attorney's conflict of interest and intelligently chose to continue with that attorney's representation notwithstanding the potential deleterious effect of the conflict on the attorney's judgment, the court thus also did a great disservice to the public and to the Bar.

Yet, when the appellate court reviewed the trial court's determination (see App. A), it applied a standard of review ("substantial evidence") (17a, 21a, 22a) that failed to safeguard against misapplication of both the standard of "clearest and most satisfactory evidence" and the requirement that the attorney's conduct be subjected to "closest scrutiny." If a trial court's finding that the presumption of undue influence was rebutted may not be disturbed on appeal if there is "any substantial evidence to support it" (17a, 21-22a), if

all conflicts in the evidence must be resolved in favor of the respondents, and all legitimate and reasonable inferences must be indulged to uphold the judgment if possible, there is no assurance that the trial court fulfilled its obligation to give the matter "the closest scrutiny."

An augmented standard of review is, therefore, warranted under the Due Process clause and to protect the integrity of the bar -- and because the matter is of such importance to all the States, and the citizens who must be protected from unscrupulous attorneys in the whole country, this Court ought to enunciate a standard that meets Due Process concerns. See Jackson v. Virginia, 443 U.S. 307 (1979) (Due process requires some consideration of the standard to be used in assessing the sufficiency of the evidence; when standard of proof is beyond

a reasonable doubt, standard is not whether "any evidence" supports verdict, but, rather whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt). See also Honda Motor Co., Ltd. v. Oberg, ___ U.S. ___, ___ n.10, 114 S.Ct. 2331 (1994), in which this Court noted that the standard of proof it discussed as insufficient as a matter of Due Process in Jackson v. Virginia, 443 U.S. at 324, is the ▪rough equivalent▪ of a verdict that is ▪against the great weight of the evidence▪.

The decision in this case is clearly against the great weight of evidence. Under Honda, then, the decision cannot pass Constitutional muster, and a standard ought to be enunciated by this Court, which should instruct State courts that the "substantial evidence" standard does

not in this context satisfy Due Process concerns.

Here, since warnings to and waivers from the client are the essential guarantees that the client has not been unduly influenced by a conflicted attorney, the evidence ought to support a finding of these facts. At the very least, then, the standard of review should be whether the evidence could reasonably support a clear and convincing finding that the attorney apprised the client of the conflict and urged the client to secure disinterested advice, and that the client determined to nevertheless have the attorney prepare the will.

This Court has not hesitated to find proceedings violative of Due Process where a party has been deprived of a well-established common law protection against inaccurate adjudication. See, e.g., Honda

Motor Co., Ltd. v. O'Berg, supra, 114 S.Ct. 2331 (1994) (Oregon's absence of judicial review of punitive damage award deemed violative of Due Process; judicial review is necessary safeguard against arbitrary deprivation of property). Here, the failure of the trial court to appreciate what must be shown by an attorney seeking to overcome the presumption of undue influence, and the failure of the appellate courts to rigorously review the trial court's actions, deprived contestants -- and the public -- not only of their common law protection against an inaccurate adjudication, but also crucial judicial protection against unethical and unprincipled attorneys. This Court should grant the petition to assure public confidence in the Bar and to protect the Due Process rights of those challenging

over-reaching by attorneys.

## CONCLUSION

This Court should grant the writ and reverse the judgment.

A summary vacatur of the decision of the California Supreme Court with a direction to consider the matter under the heightened standard of review required by Due Process, would be appropriate.

November 24, 1994

Respectfully submitted,

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# A P P E N D I C E S

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No. B 074070

(Super.Ct.No. P 718653)

IN THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

Estate of SHELTON A. McHENRY,
*Deceased.*

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EDWARD S. HALL, et al.,
*Contestants-Appellants*

v.

THOMAS E. O'SULLIVAN, et al.,
*Petitioners-Respondents.*

May 19, 1994

## Introduction

In the context of a will contest, the appellants, Edward S. Hall and William Dean Mills, seek to invalidate the residuary clause of the will of the testator, Shelton A. McHenry, which leaves the residue of the testator's multi-million dollar estate one-half to respondent, Thomas O'Sullivan, the attorney who drafted the will, and one-half to respondent, John Lynch, the testator's former business manager.[1]

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[1]This is the fifth appeal to reach us in this probate matter. In one prior appeal, summary judgments granted by the probate court in favor of respondents were reversed by this division of the Court of Appeal on November 20, 1991. (Consolidated Nos. B042160/ B044490.) In another, this court affirmed an order of the superior court dismissing for lack of jurisdiction a civil action for the tort of destroying evidence brought by 10 plaintiffs, including respondents. (No. B059042.) This court also affirmed an order of the superior court denying the motion of Debra McDaniel, another heir-at-law, to set aside the order admitting to probate McHenry's will and codicil. (B041531.) Most recently, we affirmed the judgment of the superior court granting summary judgment in favor of respondents on a petition to probate a destroyed will. (No. B 067397.) In the destroyed will action, McHenry's cousin, Beatrice Moorman, joined by Hall and Mills and several other cousins, initially claimed that a valid will executed sometime after April 20, 1985, had been destroyed. Later the petitioners changed their position and charged valid execution of the May 1984 will, and alteration or substitution of pages to make respondents the residuary legatees. The superior court found that Moorman could not prove the existence of the alleged portions of the will that did not include respondents as beneficiaries.

Appellants contend: (1) that respondents failed to present evidence sufficient to rebut the presumption of undue influence; (2) that the trial court's decision was based on errors of law; (3) that the revocation clause of the testator's will should be enforced and the residue of his estate should pass by intestacy; (4) that it was reversible error to deny evidence that the will of May 23, 1984, was not executed in the manner prescribed by law; (5) that the trial court erred by allowing introduction into evidence of purported copies of certain prior wills of the testator which O'Sullivan allegedly drafted; (6) that the will was not properly executed and witnessed, considering that the testator was blind; (7) that a divorce, not a will, was being discussed on May 23, 1984; (8) that a new trial should be granted and sanctions in the amount of $3,000 should be reversed due to insufficiency of the evidence and irregularity of the proceedings; and (9) that the order awarding sanctions against Jeffers and appellants in favor of Lynch in the sum of $107,000 should be reversed. We affirm the judgment.

## The Evidence

Shelton McHenry was a well-known Southern California restauranteur. He acquired the Tail o' the Cock Restaurant on La Cienega Boulevard in Los Angeles in 1938. Later he acquired three other restaurants, the Bantam Cock, the Valley Tail O' the Cock, and the Colonial House Restaurant in Oxnard.

McHenry died on August 24, 1987 in Los Angeles, California. He was predeceased by his first wife, Bernice

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Respondent John Lynch died in August 1993. On December 27, 1993, Elizabeth Lynch, executrix of the estate of John Lynch, was substituted in this appeal as proponent and respondent.

McHenry, who died of cancer on August 10, 1983, and had divorced his second wife, Ruth Tullis, prior to his death. He had no children by either of his two spouses, and no brothers or sisters.

McHenry's will dated May 23, 1984, and a codicil dated April 20, 1985, were admitted to probate on August 24, 1987. The will and codicil left a number of cash bequests to friends, employees and surviving relatives. A substantial portion of McHenry's estate was disposed of by a residuary clause leaving one-half shares to each of the respondents.

The codicil of April 20, 1985, declared that McHenry was divorced from his former wife, Ruth (Tullis) McHenry and was making no provision for her. The codicil also deleted as a beneficiary McHenry's mother, Mattie Lemon, who died sometime after execution of the May 23, 1984 will. It contained a standard clause confirming in all other respects the will of May 23, 1984.

The instant litigation began when appellant Hall, a cousin of McHenry, brought a petition for revocation of probate of the testator's will and codicil. He was joined by Mills upon the filing of a second amended petition for revocation of probate, which sought revocation of the entire codicil, and revocation of the will only as to the bequests to respondents.

In May 1988, Hall filed a verified petition for partial distribution by an heir, seeking a distribution from the estate of the specific cash bequests mentioned in the will.[2] The

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[2]Hall was left a $5,000 cash bequest under the contested will. Prior to 1984, Hall was not a beneficiary under any of McHenry's many previous wills. Mills has never been named as a beneficiary in any of McHenry's wills, including the May

petition characterized the pending will contest as limited to the residuary clause and any specific bequests to respondents. O'Sullivan objected to the distributions under the "no contest" provision in McHenry's will, but the objections were overruled and Hall and others were permitted to take the amounts provided for in the 1984 will.

The instant will contest continued to run its course. In April 1989, the superior court granted summary judgment against appellants. Among other findings, the superior court ruled: that Mills was not a proper contestant in the action because he failed to file a timely will contest, and failed to obtain leave to file a complaint in intervention; and that Hall was estopped to assert the invalidity of the entire will because he had validated the will by both taking and petitioning for all other legatees and devisees to take under it.

In an unpublished opinion, this court reversed the summary judgment and sent the matter back to the lower court for further proceedings. We held that despite having elected to take under the will, Hall could contest the gift of the residue. We further held that, despite the late filing of the will contest by Hall, because of the special circumstances involving alleged undue influence and fraud on the part of O'Sullivan, an attorney, the trial court was bound to examine, sua sponte, the circumstances under which the gifts of residue and specific bequests were made to O'Sullivan and Lynch. Other findings of the superior court were left undisturbed.

Thereafter, a court trial of the will contest was held on the limited issues of fraud and undue influence relating to the residuary clause, and the alleged conspiracy between respondents, John Lynch and Thomas O'Sullivan. In light of the legal presumption of undue influence against O'Sullivan, as

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1984 will.

the attorney who drafted the 1984 will and 1985 codicil, the trial court required O'Sullivan to proceed first with his evidence.

Since 1955, Thomas O'Sullivan has been a tax and estate planning attorney.[3] He was hired by Attorney Todd Johnson, in 1955, to work in Johnson's law office. Shelton McHenry and his wife, Bernice, were among O'Sullivan's first clients.[4] From 1955 until the death of McHenry in 1987, regardless of what law firm O'Sullivan became affiliated with, he devoted a substantial percentage of his time to the McHenrys' legal work. The McHenrys' were private about their legal affairs and made it clear to O'Sullivan that they did not want their legal work done by others.

O'Sullivan began doing estate planning work for the McHenrys in about 1960, while still in Johnson's employ. Through the years, the McHenrys executed about a dozen wills and codicils drafted by O'Sullivan. Their estate plans consistently followed a pattern established prior to the time O'Sullivan became their lawyer. Until Bernice passed away in 1983, Bernice and Shelton McHenry generally wrote reciprocal wills, wherein each spouse left his or her estate to the surviving spouse. In the event the spouse predeceased the testator, the will left specific bequests of cash and property to particular relatives, and the restaurant businesses and residue of their estates to key employees and professionals. Once an

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[3]A substantial portion of O'Sullivan's testimony was proffered in the form of a 31-page declaration.

[4]Johnson was the owner of the Los Angeles restaurant, Somerset House. Before becoming McHenry's lawyer, he helped McHenry acquire the Tail O' the Cock restaurant in 1938.

employee left the McHenrys' employment, they routinely eliminated that person from their wills.

Over the years, the McHenrys made frequent changes in their wills, changing the amounts and percentages various beneficiaries would receive of the estate if the testator had no surviving spouse. Detailed instructions for modification were often given to O'Sullivan in writing, followed up by conferences and follow-up telephone calls.

According to O'Sullivan, it was not the McHenrys' normal practice to leave the residue of their estate to relatives. One exception was McHenry's mother, Mattie Lemon, who was left a percentage of the residue for a period of time before her death.

One of the McHenrys' earliest wills left 10 percent of the residue of the surviving spouse's estate to their attorney, Todd Johnson. O'Sullivan first appeared as a beneficiary of 5 percent of the residue in the 1965 will. On written instructions from Bernice McHenry, O'Sullivan was also made a contingent beneficiary of Johnson's share if Johnson predeceased McHenry, but only if he was still working for Johnson's office at the time of McHenry's death. O'Sullivan's percentage share of the residue was increased to 14 percent in McHenry's 1969 will. In subsequent wills and codicils, O'Sullivan's share was first increased to 16.5 percent, then decreased to 15 percent, then increased to 50 percent in the August 1981 will.[5] The 50 percent residuary gift was carried over into the May 1984 will.

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[5]Under the 1981 will, O'Sullivan was also to receive the Colonial House Restaurant and property. Under the 1984 will, the gift of the Colonial House Restaurant was deleted and O'Sullivan was given a one-half interest in the Valley Tail O' the Cock Restaurant.

O'Sullivan never suggested to the McHenrys that they make him a bequest, or increase the amount of any bequest. O'Sullivan also never discussed the McHenrys' estate plan with John Lynch.

When O'Sullivan first became aware that McHenry wanted to make Johnson a legatee of a share of the residue of his estate, O'Sullivan asked Johnson whether McHenry's will should be prepared by another attorney. Johnson informed O'Sullivan that he had previously discussed the matter with McHenry, and that McHenry did not want any other law firm doing his legal work. O'Sullivan had similar discussions with the McHenrys, and personally warned them of the potential legal challenges that might result from leaving the bulk of their estate to persons other than their relatives. O'Sullivan is certain he had such a conversation in connection with some of the earlier wills in which he was left a share of the residue. Except to that extent, O'Sullivan never questioned the McHenrys about the identities of, or the character of, bequests made to relatives. The McHenrys had very strong opinions about how they wanted their estate divided, and did not want anyone else doing their legal work. After a number of years, the conflict of interest issue was no longer brought up with them.

Over the years, O'Sullivan also became involved in the McHenrys' business affairs. For every year from 1955 until the restaurants closed down, O'Sullivan prepared the income tax returns for the business. He also handled audits of the Internal Revenue Service and Franchise Tax Board, sought deferrals of jury service for restaurant employees, handled the legal aspects of any sale of property, and represented the business before the labor board.

A short time prior to May 23, 1984, after McHenry's discharge from the hospital following a stroke, O'Sullivan had

a meeting with McHenry about changing the will he had executed in 1981. McHenry gave O'Sullivan specific instructions as to its content, and O'Sullivan made notes of the requested changes on a copy of the 1981 will. At the time of trial, O'Sullivan no longer had those notes.

At the time of the May 1984 will, McHenry had recently married his second wife, Tullis. Among other changes from the 1981 will, the 1984 will added a gift to Tullis in the sum of $500,000. The 1984 will also deleted certain gifts of personal items which McHenry had disposed of following the death of his first wife. O'Sullivan was the only person present with McHenry when the proposed changes were discussed.

The will was executed on May 23, 1984, in McHenry's apartment. At the time of trial, O'Sullivan could no longer recall who was in McHenry's apartment on May 23, 1984, when the will was signed. O'Sullivan read to McHenry the dispositive paragraphs of the will, and McHenry said, "fine." McHenry, who was wearing glasses, glanced at parts of the will and certain handwritten changes were made at McHenry's request. Afterward, O'Sullivan called his office for two witnesses. When the witnesses arrived, McHenry signed and initialed the will in their presence.

Dr. James R. Blake is a physician. He met the McHenrys in the late 1970's, when Mrs. McHenry was referred for medical care. Later, he became the treating physician for Mr. McHenry after he suffered a heart attack in January 1984, followed by a stroke in March 1984. According to Dr. Blake, the stroke did not have any adverse impact on McHenry's ability to think, and he was functioning well from a mental standpoint in July 1984.

It is undisputed that McHenry suffered from impaired vision. Dr. Gary Asano saw McHenry in December 1984 on

referral from the Jules Stein Eye Institute. At that time, McHenry could read seven point type using a pair of high-powered reading glasses with a magnification 50 percent higher than McHenry's own reading glasses. Seven point type is smaller than a typical typewritten page, which is normally eight or ten point type. McHenry's degree of macular degeneration and visual acuity were probably about the same in May 1984.

Reverend Clifton King was McHenry's clergyman for 18 years. He conducted the funeral service for Bernice McHenry, when she passed away. He also performed the marriage ceremony of McHenry and his second wife, Tullis.

In May 1984, while in the hospital following his stroke, McHenry discussed with King his plans to divorce Tullis. During this hospital visit, McHenry gave King the telephone number of his attorney, O'Sullivan, and asked King to dial his number. King heard McHenry ask O'Sullivan to come and see him because he wanted to annul his marriage.

During a conversation in May 1994, McHenry told King of his intention to leave his personal assistant and chauffeur, Terry Gillard, a $300,000 bequest. McHenry queried whether the sum should be placed in a trust.[6]

John Lynch was 66 years of age and retired at the time of his trial testimony. For 15½ years prior to his retirement, he was the general manager for McHenry's restaurant properties and other holdings. At the time Lynch took over as general manager for McHenry, all four of the restaurants were losing money and were on the market for sale. The restaurants

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[6]Several other witnesses for appellants described statements in which McHenry expressed his intention to leave Terry Gillard a substantial bequest.

continued to lose money during their last years of operation. By the time Lynch quit working for McHenry, all of the restaurants had been sold.

Lynch had a deferred compensation arrangement with McHenry which provided that, if he worked from July 1, 1977, through his 65th birthday, in 1991, he would receive $200,000. Lynch did not work until 1991 because McHenry sold or closed the last of his restaurant properties in 1986. Lynch received a settlement of his deferred compensation in the sum of $200,000, paid in three annual installments.

Following the sale of one of the restaurants in 1980, the McHenrys told Lynch they intended to leave one of the restaurants to him in one of their wills. According to Lynch, shortly after McHenry's funeral, he learned for the first time from O'Sullivan that he was a 50 percent residual beneficiary of McHenry's will.

When his wife Bernice's health was deteriorating, McHenry asked Lynch to take over the handling of his mother's affairs. Lynch did so for several years until McHenry's mother passed away.

Lynch testified that despite McHenry's vision problems, he remained actively involved in the buying and selling of his own stocks until sometime in 1986. McHenry also stayed active in management decisions and never appeared confused, or unable to make a decision. As late as January 1987, McHenry was able to see sufficiently to sign checks and legal documents.

Lynch denied witnessing the signing of any of McHenry's wills. He was a participant in the residuary clauses of McHenry's wills in 1972, 1975, 1976 and 1981, but denied knowing that he was a beneficiary in any of the wills until after McHenry's funeral.

Lynch was a 35 percent residual beneficiary under a 1972 codicil, a 55 percent residual beneficiary under a 1975 codicil and a 1976 will, and a 50 percent residual beneficiary under McHenry's 1981 and 1984 wills. The 1981 will also left Lynch the entire Valley Tail O' the Cock Restaurant. In the 1984 will, the gift was decreased to a one-half interest in the restaurant.

Lynch wound up McHenry's business affairs shortly before the end of February 1987. He retired on February 28, 1987. Lynch did not see McHenry again after he retired and started traveling.

David Freeman was formerly and employee of O'Sullivan's law firm of Rutter, O'Sullivan, Greene and Hobbs. On May 23, 1984, he was advised that he was needed to witness a will for McHenry at his apartment. Freeman recalled that McHenry was fairly thin, and had white or gray hair and was walking around the room. According to Freeman, no one read the will to McHenry in Freeman's presence and it did not appear to him that McHenry was blind.

Julie Jean Holtz, another of O'Sullivan's employees, was also a witness to the signing of the May 23, 1984 will. Holtz recalled that the whole process took about 15 minutes and the will was not read aloud to McHenry.

Joseph Rossi is a physical therapist at St. John's Hospital in Santa Monica. He gave physical therapy to McHenry from April 1984 until the end of May 1986, on a daily basis. On May 23, 1984, McHenry was still suffering from paralysis and could not have walked around a room without the help of a walker and two assistants. McHenry was a big man, not a thin man, in May 1984.

On April 20, 1985, Rossi was present in McHenry's apartment to give him physical therapy. Rossi was a witness

to the signing of the codicil to McHenry's will but has no recollection of it. He would have recalled if someone tried to influence McHenry to sign something in his presence.

Gladys DuBois is one of the nurses who worked for McHenry following his stroke, which occurred on March 14, 1984. According to DuBois, McHenry could not see well enough to feed himself or read. DuBois was required to feed McHenry, and to read written materials to him.

One day, while McHenry was still hospitalized, McHenry declined to entertain a visit from O'Sullivan and told DuBois that O'Sullivan was just his lawyer. Shortly after his release from the hospital, McHenry told Dubois that O'Sullivan was just an employee, not a friend. He mentioned that O'Sullivan was preparing a will for him and expressed hope that O'Sullivan was honest.

DuBois also discussed Lynch with McHenry. According to DuBois, McHenry stated that he had promised Lynch $1 million in his lifetime to stay and be his business manager. He also expressed the opinion that the reason his business was decreasing was because of the poor quality of the food under Lynch's management.

Beatrice Cunningham Moorman is McHenry's first cousin. She received a cash bequest of $10,000 under the May 1984 will.

McHenry lived with Moorman's parents, Grace and Claude Cunningham, when he first came to California during the Depression. According to Moorman, McHenry was very close to the Cunninghams and for years sent them $300 every month. He sent the money to Moorman's mother after her father passed away.

Before McHenry married Tullis in February 1984, Moorman had lunch with McHenry at one of his restaurants,

to discuss his will. McHenry told Moorman not to worry, that her mother would be taken care of. McHenry also stated that his assistant, Terry Gillard, would be "taken care of for the rest of his life".[7]

While Moorman was dining with McHenry, Lynch came to the table repeatedly to advise McHenry that O'Sullivan was waiting for him. McHenry finally got angry and said, "Damn it, O'Sullivan works for me. I don't work for him."

Moorman discussed the will with McHenry a number of times during a six-month period. McHenry always mentioned Gillard and promised to take care of him. Up until two months before he died, McHenry said that Gillard would be taken care of for the rest of his life, and so would Moorman's mother; McHenry indicated that the balance of his estate would go to "a handful of relatives."

After McHenry died, Lynch contacted Moorman 18 to 25 times and tried to persuade her not to contest the will. Moorman never met Tullis; was not invited to the McHenry-Tullis wedding. McHenry had never visited her in her home.

Terry Gillard testified that he was employed by McHenry from the fall of 1979 through July 1987. On May 23, 1984, Gillard was working at McHenry's apartment when McHenry received a visit from O'Sullivan, O'Sullivan's female secretary and Lynch.[8] Gillard wheeled McHenry into the dining room to see his guests and retired to the kitchen, where he could hear McHenry and the others joking about Tullis.

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[7]Gillard received only a $10,000 cash bequest under the May 1984 will.

[8]For the first time at trial, appellants attempted to prove that Lynch was present at the May 23, 1984 will signing.

According to Gillard, within two to three weeks after McHenry had his stroke, Tullis was out dating other people. McHenry did not like it. On May 23, 1984, McHenry was completely preoccupied with his marital situation. McHenry filed for divorce in June 1984.

Sometime during the summer of 1984, Gillard reminded McHenry of his promise to provide for him if he continued working for him, and inquired about what that meant. McHenry told Gillard not to worry, that he had been taken care of.

According to Gillard, McHenry was furious with Lynch at the time he finished paying off the $200,000 in deferred compensation benefits in January 1987.

Rita Huddleston is one of the two nurses who cared for McHenry following his 1984 stroke. McHenry returned home from the hospital after his stroke on May 14 or 15, 1984. On May 23, 1984, Huddleston recalls that O'Sullivan came to the apartment at about 2 p.m. in the afternoon.[9] John Lynch was already present. O'Sullivan was accompanied by a young woman identified as his secretary.

On this occasion, McHenry confided to Huddleston that O'Sullivan was a "slob" upon seeing O'Sullivan arrive with his collar unbuttoned and his tie pulled down and his suit jacket slung over his shoulder. Asked by Huddleston why he

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[9]Huddleston described the day as unpleasantly hot, more like a day in September or October. The Los Angeles Times for May 24, 1984 indicates that on May 23, 1984, the high temperature at the civic Center was 78 degrees. At the Los Angeles International Airport, the high temperature was 70 degrees. In Santa Monica, near Westwood where McHenry lived, the high temperature was 70 degrees.

continued to employ O'Sullivan, McHenry replied that he did not like to make changes.

Huddleston heard McHenry, Lynch and O'Sullivan discussing divorce, and whether McHenry could get certain items of jewelry back from Tullis. She did not hear the rest of their conversation. No one else came to the apartment that day.[10]

John Lynch denied having any recollection of being in McHenry's apartment on the May 23, 1984, when the will was signed. He admitted being in and out of McHenry's apartment once or twice per week over a four-year period. He does not recall either being in McHenry's apartment with O'Sullivan and his secretary, or being there while McHenry's divorce or annulment was discussed. He did not discuss McHenry's will with O'Sullivan until after McHenry's will and codicil were admitted to probate.

According to O'Sullivan, McHenry did ask about getting items of jewelry back from Tullis, but not until after May 23, 1984.

At the conclusion of the trial, the court found that O'Sullivan had rebutted the presumption of fraud, undue influence and mistake, not only by clear and convincing evidence, but by the standard of beyond a reasonable doubt. The court found no evidence whatever of fraud or undue influence by respondents, or of a conspiracy between them.

Discussion

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[10]At her deposition, Huddleston testified that the visit from O'Sullivan and Lynch occurred on May 24, 1984. She assumes Gillard must have been absent from the apartment at the time. Otherwise, McHenry would not have asked her to open the door for his visitors.

I

Many of appellants' contentions amount to attacks on the sufficiency of evidence to support the judgment. We address them together, albeit not necessarily in the order advanced.

Appellants specifically argue that O'Sullivan failed as a matter of law to rebut the presumption of undue influence since he did not encourage the testator and his wife to seek advice from independent counsel, did not discourage the proposed bequest, did not remind them of the natural objects of their bounty, and failed to give them appropriate tax and estate planning advice.

In making their arguments, appellants give lip service to the substantial evidence standard. Yet those portions of the record purportedly establishing fraud and undue influence are summarized in vivid detail, to the exclusion of much of the evidence favoring respondents.

The standard of review on appeal is well settled. "The question whether the evidence adduced by a party who has the burden of proof carries the required weight is for the trier of fact and not the court of review." (*Estate of Gelonese* (1974) 36 Cal.App.3d 854, 863.) This means that the trial court's finding that the presumption of undue influence was rebutted may not be disturbed on appeal if there is any substantial evidence to support it. (*Id.* at pp. 966-867; *Estate of Clegg* (1978) 87 Cal.App.3d 594, 600.) All conflicts in the evidence must be resolved in favor of the respondents, and all legitimate and reasonable inferences must be indulged to uphold the judgment if possible. (Ibid.)

With respect to the purported lack of any advice to seek independent counsel, appellants discount the relevant facts. The subject of a conflict of interest was broached with

McHenry when he first made his lawyer, Johnson, a beneficiary under his will. The subject was raised again by O'Sullivan in connection with some of McHenry's earlier wills which made O'Sullivan a beneficiary. Undue influence is not established as a matter of law merely because long before the 1981 and 1984 wills were drafted, O'Sullivan ceased suggesting that McHenry might wish to have independent counsel draft his wills.

The evidence shows that McHenry was a sophisticated businessman and restauranteur with an acute sense of privacy in personal matters. He frequently changed his will and had apparently intractable views about who he wanted performing his legal work as well as how he wanted to dispose of his wealth. For nearly 30 years, his wills followed a predictable pattern which included the dividing of the residue of his estate among valued employees, including his lawyer. The bequests to O'Sullivan and Lynch were in keeping with his pattern.

Furthermore, at the time of the will signing, McHenry was still capably managing his own business affairs. The record reasonably supports the inference that McHenry was fully aware of the conflict inherent in having his lawyer draft a will bequeathing a substantial gift of the residue to himself and chose in the interests of privacy to disregard it.

In arguing that O'Sullivan had a duty to remind McHenry of the natural objects of his bounty, appellants erroneously assume that they, mere first cousins, qualify as the natural objects of the testator's bounty. This contest does not involve an "'"unnatural will" where dependents and those who had grown accustomed to lean upon the bounty of one are, at that death of that person, without apparent reason deprived by his will of that bounty.'" (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 608.) At the time of his death, the testator had no present spouse, and no surviving parents, brothers,

sisters, children or grandchildren.

Lynch had worked as the testator's financial and business manager for more than 15 years, during which period he accomplished cash sales of the testator's restaurants for approximately $11 million, and performed such personal tasks as caring for the affairs of his failing mother. O'Sullivan, exclusively, had handled all of the testator's legal affairs for more than 30 years. Under the circumstances, appellants were in reality no more the "natural objects" of the testator's bounty than respondents. (*Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 608; *Estate of Ventura* (1963) 217 Cal.App.2d 50, 60.)

Appellants also assert that O'Sullivan failed to carry his burden of proving the absence of undue influence, in that he purportedly admitted the failure to give the type of tax advice which any estate planning specialist should have given in connection with the drafting of the 1984 will. They make the related contention that the trial court erred as a matter of law when it disregarded as irrelevant O'Sullivan's failure to give the "usual advice" in the drawing of an estate plan merely because the lawsuit did not involve malpractice.

Appellants have cited no authority compelling a finding of undue influence in the procurement of the residuary clause merely because, in 1984, O'Sullivan did not discuss with the testator the possible tax ramifications of the $500,000 bequest of his new wife, or other provisions of his estate plan. This is not a case wherein the omitted tax advice, had it been given, was likely to result in a less generous gift, or no gift, to O'Sullivan or Lynch. (Cf. *Estate of Cleg*, *supra*, 87 Cal.App.3d at p. 599.) Indeed, the $500,000 bequest to Ruth Tullis McHenry, and newly added or increased cash bequests to Hall, Gillard and others -- which O'Sullivan included in the 1984 will without question or advice -- actually decreased the

value of the residue by more than $500,000.

Without question, O'Sullivan took "a grave risk" by drawing a will in which he received more than a modest gift in keeping with the nature of the marginally social relationship he shared with his client. (*Magee v. State Bar* (1962) 58 Cal.2d 423, 433.) His actions were ill-advised. One adverse consequence is that after many years of litigation, the instant will contest is only now drawing to a close. Nonetheless, substantial evidence supports the trial court's finding that O'Sullivan sustained his burden of proving by clear and convincing evidence that no undue influence was brought to bear in connection with the challenged residuary clause.

Appellants also challenge the sufficiency of evidence to show that the May 23, 1984 will was properly witnessed, and that the testator knew he was signing a will containing the offending residuary clause. They maintain that on that date, the testator was blind, in failing health, and completely preoccupied with divorcing his errant spouse. They argue that respondents must necessarily be lying about the lack of preconceived plan to defraud the testator and his kin, because, among other reasons: they were no longer in the testator's good graces in May 1984 and therefore were unlikely beneficiaries; several of McHenry's collateral relatives and Terry Gillard did not receive the generous bequests they were promised or led to expect; one of the witnesses inaccurately described the testator as sighted and able to walk and therefore he could not have attended the testator's will signing; and McHenry's nurse, and his personal assistant reportedly saw and heard things on May 23, 1984, inconsistent with the proper execution of a will witnessed by Holtz and Freeman.

Appellants' recitation of the "facts" amounts to nothing more than an invitation to this court to reweigh the evidence and substitute its judgment for that of the trial court.

Conflicting evidence was presented with respect to who witnessed the signing of the May 23, 1984 will, and the trial court resolved all of the conflicts against appellants. The testimony of Gillard and Huddleston, that Lynch was present on that date, was fraught with inconsistencies and was found incredible.

Substantial evidence supports the inference that the testator knew he was executing a will, not divorce documents on May 23, 1984, and that the will signing occurred in the manner described by O'Sullivan and his two former employees. Inferences are also supported that, in May 1984, the testator was functioning well from a mental standpoint; that he had sufficient vision, with the help of visual aids and use of peripheral vision, to discern what he was signing; and that he intended to leave the residue of his estate to the lawyer and financial manager who had served him for many years, and not to Gillard, Moorman, or any other of his surviving cousins. In short, appellants have given us no reason founded in the insufficiency of the evidence to disturb the lower court's judgment.

In the reply brief, appellants call our attention to several recently enacted provisions of the Probate Code which restrict donative transfers to certain "prohibited transferees," including "an attorney, conservator, or other person having a fiduciary relationship with the transferor, who drafted, transcribed, or caused to be drafted or transcribed, the instrument." (Prob. Code, § 21350, subd.(a)(1); see also Prob. Code, § 21351 added by Stats. 1993, Ch. 293 9A.B. 21), § 8.) Based on Probate Code section 21351, subdivision (d), appellants ask that we review the sufficiency of evidence without consideration of O'Sullivan's own testimony. Subdivision (d) of section 21351 provides in relevant part that for instruments executed on or before July 1, 1993, the court may determine upon clear and convincing evidence, excluding the testimony

of an attorney who drafts a testamentary instrument, that the transfer to such attorney was not the product of fraud or undue influence.

The evidentiary restriction contained in subdivision (d) of Probate Code section 21351 has no application to instruments that became irrevocable, or were executed by persons dying prior to September 1, 1993. (Prob. Code, § 21355.) Under the evidentiary rules controlling at the time of the trial, the court was allowed to consider O'Sullivan's testimony on the undue influence issue and make its findings accordingly. (*Estate of Raphael* (1953) 115 Cal.App.3d 525, 530.)

II

Appellants maintain that, because Lynch was in a confidential relationship with the decedent, and actively participated in procuring the execution of the 1984 will, he too had the burden of disproving undue influence with respect to the residuary clause. They contend that he has not met this burden.

Appellants conveniently disregard the fact that Lynch denied any knowledge of or participation in the procuring of the contested will and codicil -- or any other will for that matter -- and the trial court found no hint of participation, much less fraud or wrongdoing on his part. Since there is substantial evidence to support the trial court's finding, the presumption of undue influence was never triggered with respect to Lynch. (See *Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 605; *Estate of Fritschi* (1963) 60 Cal.2d 367, 374-376.) It is appellants who failed to sustain their burden of proving undue influence.

Appellants have suggested that, even if Lynch was not actively involved with O'Sullivan's alleged extrinsic fraud, this

court should remand the matter to the trial court for further findings with respect to the Lynch bequest. As support for this proposition, they point to dicta in a previous opinion recognizing the probate court's equitable power to decide to what extent O'Sullivan's alleged misbehavior may have influenced the gift to Lynch. (*Estate of Shelton A. McHenry*, B042160, B044490; unpub. opn. filed Nov. 20, 1991, p.26.) The trial court found no misbehavior on the part of O'Sullivan. It follows that no purpose would be served by remand to determine the effect of O'Sullivan's misbehavior on the bequest to Lynch.

III

Appellants complain that the trial court should not have allowed the introduction of "purported" copies of certain prior wills that O'Sullivan drafted for the testator and his first wife. Citing the best evidence rule, they object on the ground that the copies of the wills were unsigned, and unaccompanied by proof that the wills were ever executed, or that pages were not substituted.

Several of the copies to which appellants refer are copies of draft versions of the McHenrys' wills, offered to illustrate how the McHenrys communicated their instructions to O'Sullivan. These copies were admissible under Evidence Code section 1504. For many of the McHenrys' prior wills and codicils, O'Sullivan retained only carbon copies. The copies were identified and authenticated, and were properly admitted. (Evid. Code, § 1502.)

Two significant prior testamentary instruments were presented in their original form: the will of June 2, 1971 and the codicil of August 15, 1975. The 1971 will leaves 16.5 percent of the residue to O'Sullivan. Under the 1975 will, Lynch is left 55 percent of the residue of the testator's estate, a share greater than he received under the 1981 and 1984

wills, and O'Sullivan's share is reduced to 15 percent. The testator's generous attitude toward O'Sullivan and Lynch is manifest in these signed original documents.

Accordingly, the receipt into evidence of copies of McHenry's prior wills and codicils was not error.

IV

Appellants assert their motion for new trial should have been granted. Among other grounds, they argue that a new trial is necessary because the trial court erroneously refused to consider evidence proving that the will of May 23, 1984 was not executed in the manner prescribed by law and was obtained by fraud.

They maintain that the trial court should have allowed the testimony of co-executor Howard Marvin. Appellants made an offer of proof that Marvin would testify to "some of the tricks that O'Sullivan and Lynch pulled as a conspiracy." According to counsel for appellants, Marvin was supposed to receive a $100,000 bond according to McHenry's will and instead received twenty $5,000 bearer bonds. Marvin was also to testify that he was very close to McHenry and talked with him frequently. McHenry would have left a bequest to Terry Gillard and would have remembered that a number of personal items were to go to people other than Lynch and O'Sullivan.

Marvin could also have testified that he discussed with McHenry the fact that he ought to have a living trust, but O'Sullivan would not draw it for McHenry. Finally, a trust was drawn on McHenry in 1975. Until the day he died, McHenry was induced to believe he had a living trust. McHenry carried real estate in the name of the living trust, and carried notes and deeds of trust in the name of the living trust.

The trial court rejected the above offer of proof. Later, in announcing its decision, the court stated that Marvin's

receipt of bearer bonds was irrelevant to show a conspiracy between Lynch and O'Sullivan. The court further stated that the 1984 will made 27 specific bequests in addition to the residue, and no factual basis had been offered to prove that McHenry would have made specific additional bequests.

Regarding the claim by Marvin that O'Sullivan refused to draw up a living trust until 1975, and made McHenry believe he had a living trust, the court noted that the terms of the living trust had been place in evidence. The court found the living trust issue to be a "red herring" given that the trust, established nine years before the will, merely put the testator's property back into the estate, and disposed of it in accordance with the will. We find no fault with the trial court's ruling.[11]

Appellant did not call handwriting expert William Hatch at trial, but made an offer of proof about his proposed testimony. Hatch was to testify that the initials opposite paragraph 7 of the 1984 will were not McHenry's. No offer of proof was made concerning whose initials they purported to be.

The trial court rejected the offer of proof as unduly time-consuming and irrelevant. The ruling was not an abuse of discretion.

The seventh paragraph of the May 23, 1984 will was a handwritten entry bequeathing to Howard Marvin a bond with a face value of $100,000. Subparagraph (c) of the eighth paragraph of the same will was lined out by hand, deleting the gift of the Colonial House Restaurant to O'Sullivan. Initials

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[11]The trust agreement for the McHenry revocable trust established in August 1975 provides that on the death of the first grantor to die, the trustee shall distribute the trust estate to the surviving grantor, free of trust.

purporting to be McHenry's -- about which the expert's testimony related -- were placed next to each of the handwritten changes.

The court found the testimony of the expert irrelevant to show fraud on the part of O'Sullivan, considering that the initialed changes had the effect of decreasing the residue of the estate by $100,000 to O'Sullivan's detriment, and deleting a substantial gift of real estate to O'Sullivan. The court also refused the offer of proof on the ground that the validity of the will had already been determined by the appellate court. The trial court correctly presumed that since a finding of fraudulent initials would invalidate the integrity of the entire will, the testimony was beyond the scope of the limited issues being tried.

Appellants complain that the trial court improperly restricted Terry Gillard's testimony about McHenry's divorce, which took place during the period of the May 23, 1984 will. Other witnesses mentioned McHenry's marital problems. The dates upon which the divorce from Tullis was filed and finalized are established by the record. Accordingly, that evidence was cumulative. Its exclusion, even if error, was nonprejudicial.

Also at issue is the trial court's restriction of Gillard's examination about events on the day McHenry died. The excluded testimony was offered to show tat on the day of McHenry's death, O'Sullivan, a co-executor under the will, brought Lynch to the apartment rather than co-executor Marvin. O'Sullivan and Lynch purportedly opened McHenry's safe and took out an envelope labeled "Will" and O'Sullivan put it under his arm and returned with Lynch to his office. Later, O'Sullivan and Lynch denied the existence of any important papers in the safe, including a will.

Gillard would also have testified that Marvin was told

to come to the apartment on Wednesday following McHenry's death, at which time all of the furniture was to be removed from the apartment. O'Sullivan and Lynch removed the furniture before Marvin arrived. O'Sullivan and Lynch then divided McHenry's cars between them.[12]

The trial court correctly perceived that, considering the procedural posture of the case, appellants' pleadings and concessions in this and prior related actions, and the disposition of several prior appeals by this court, the sole issue remaining for its determination was whether the 1984 residuary clause and 1985 codicil were procured by undue influence or fraud on the part of O'Sullivan or Lynch.

Evidence showing improper execution of the 1984 will, or that Lynch and O'Sullivan destroyed or hid part or all of the testator's real will on the date of his death went beyond the limited scope of the trial. The destroyed or altered will allegation was decided against appellants nearly a year before the trial, when appellants and co-petitioner Moorman were unable to produce sufficient evidence to defeat summary judgment of their petition to probate a destroyed will.

Finally, appellants maintain that they were improperly prohibited from calling five other witnesses who were subpoenaed and prepared to testify to "important matters pertaining to decedent's relationship with both O'Sullivan and Lynch." In fact, appellants' counsel elected, on the record, not to call these witnesses because their testimony was

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[12]Lynch is still in possession of one of McHenry's vehicles. The vehicle was one of the three that were of concern to McHenry while he was alive. Lynch paid McHenry $1 for the car, took title, and paid the insurance for it. He did not take the car as a part of any plan with O'Sulivan to divide McHenry's property between them.

cumulative of testimony given by others. The trial court was not called upon to rule on the admissibility of such testimony.

Appellants also contend that a new trial should have been granted based on the "irregularity of the proceedings." The list of claimed irregularities includes: that the court failed to send the matter to Department 1 of the Los Angeles Superior Court pursuant to Probate Policy Memorandum 3:16 [sic], and improperly refused to disqualify itself upon the filing of an affidavit under Code of Civil Procedure section 170.6; that the trial court restricted the trial to only two and one-half days, reversed the order of proof, and prevented appellants from calling important out-of-state witnesses by granting a mid-trial continuance for two weeks; that the trial court excluded evidence that Lynch and O'Sullivan removed documents from the testator's safe the day of his death, and later lied about it; that the trial court was harsh on appellants' counsel and made derogatory remarks in the presence of appellants and their witnesses; that the trial court sanctioned appellants' attorney for making a motion for new trial; that the trial court allowed O'Sullivan to produce evidence of wills executed in the 1960's, and to introduce evidence which O'Sullivan had failed to produce during discovery, but would not allow appellants to produce evidence of Lynch's and O'Sullivan's conduct in the years 1985 to 1987; that the court refused to comply with Probate Code section 6124 which creates a presumption that a will was destroyed with the intent to revoke if neither the original nor a copy can be found in the testator's possession, and the testator was competent until death; and the trial court made the erroneous evidentiary rulings previously discussed.

About those alleged "irregularities" mentioned in appellants' briefs but not supported by appropriate references to the record, it suffices to say that none appear to amount to error of the sort entitling appellants to a new trial. Likewise,

we decline to reconsider claimed "irregularities," such as the trial court's evidentiary rulings, already sufficiently addressed in the context of appellants' other arguments.

Appellants make the argument that the trial court should not have considered the testator's 1981 will because the original could not be found in the possession of the testator; therefore, it was subject to the presumption that it was destroyed with the intent to revoke. (Prob. Code, § 6124.) The argument is nonsensical. The 1981 will was not admitted to probate. The 1981 will was expressly revoked by the 1984 will. Revocation of the 1981 will, whether express or presumed, did not diminish its relevance to show that in 1981, prior to suffering a heart attack and stroke, McHenry was inclined to leave the bulk of the residue of his estate to respondents.

Appellants have cited no authority for the novel proposition that the trial court's failure to transfer the matter to Department 1 entitles them to a new trial. Nothing in the superior court's Probate Policy Manual mandates that a contested matter over two days in length be transferred to Department 1. (Super. Ct. of the State of Cal. for the County of L.A. Prob. Policy Manual (1993) § 3:5:01, subd.3.) The denial of a transfer to another department was within the trial court's proper exercise of its inherent authority to supervise and control the litigation before it. (Code Civ. Proc., § 128, subd. (a)(3).)

Appellants complain that they were denied an adequate opportunity to present their case as a consequence of changes in the order of proof, unreasonable restrictions imposed on the time allowed for presentation of evidence, and the mid-trial continuance of the trial for two weeks. No abuse of judicial discretion is manifest in the record.

It was generally understood by all parties that the scope

of the issues to be tried was narrowly circumscribed by previous rulings of the trial and appellate courts. The trial court retained broad discretion to limit direct and cross-examination to avoid irrelevant, collateral, or cumulative evidence. The evidence was restricted accordingly, without apparent prejudice to appellants.

Furthermore, the record belies appellants' claim that the trial court was adamant about limiting the trial to two days. After the presentation of O'Sullivan's evidence, the trial court asked appellants' counsel how much time they thought their case would take. The judge noted that a two-day estimate had been given, but assured counsel that the court had "additional time available." Counsel for Hall asked if the court could give them "two afternoons." No response was heard from Mills's counsel.

Appellants find no fault with the trial court's determination that O'Sullivan was to carry the burden of proof on the undue influence issue. Any changes in the order of the evidence to accommodate the presumption of undue influence were well within the trial court's inherent discretion to control the proceedings. (Code Civ. Proc., § 128, subd. (a)(3).)

Appellants complained that the two-week, mid-trial continuance deprived them of three witnesses who had to return to Missouri. The record is devoid of <u>any</u> evidence to support this contention.

The transcript of proceedings on November 24, 1992, shows no objection to a continuance of several weeks. On that date, the trial court offered to resume the proceedings on December 1, but Bruce Ross, Hall's counsel, stated that he would be engaged in trial. The matter was thereafter rescheduled for December 7. On December 7 and 8, 1992, appellants called most of their witnesses. Then the matter was continued on December 23, 1992, to enable them to secure the

attendance of Rita Huddleston upon her release from the hospital. The granting of a two-week, mid-trial continuance is not cognizable as an issue on appeal.

Appellants assert that the trial court was biased against trial counsel and made derogatory remarks to him in the presence of appellants and their witnesses. Two lawyers represented appellants at trial but we presume from the record that appellants' complaint is directed to the court's conduct toward Thomas J. Jeffers, Jr., Mills's trial counsel. Appellants also make the related argument that the trial judge should have granted their motion for disqualification under the Code of Civil Procedure section 170.6. Both issues are waived by the failure to take timely and appropriate steps to preserve them. (*People v. Burnett* (1993) 12 Cal.App.4th 469, 475; *Guedalia v. Superior Court* (1989) 211 Cal.App.3d 1156, 1159-1160.)

It is contended, also that the proceedings were irregular because the trial judge allowed O'Sullivan to introduce evidence of the testator's prior wills which he had refused to produce during discovery. The allegation is unsupported. Appellants' appendix contains convincing evidence that the copies and originals of the wills and codicils of Shelton and Bernice McHenry were delivered to appellants' own questioned documents examiner on April 3, 1989, and retained for a considerable period of time.

V

Appellants and Jeffers contest the imposition of sanctions by the trial court under Code of Civil Procedure section 128.5. At the conclusion of the trial, the court ordered Hall, Mills, and Mills's counsel, Jeffers, to jointly and

severally pay $107,000 in sanctions to Lynch.[13]

In awarding sanctions, the trial court found that the action against Lynch had been "entirely, completely 120 percent without merit," and that Jeffers had acted in subjective bad faith in filing a "series of actions which were unfounded and were designed only, in the opinion of the court, to thwart the due processes of the court."

Following appellants' motion for new trial, the trial court awarded additional sanctions of $3,000, explaining that it was awarding only $3,000 in sanctions, rather than the $3,900 requested, because the filing of a motion for new trial is "almost routine." The court then commented that the reduced sanctions award was nevertheless appropriate, because counsel had "burdened [the new trial motion] up with all these grounds that are just so completely irrelevant, so completely fallacious, but to which the responding party had to address time."

Having been forced to address a multiplicity of meritless contentions in the instant appeal, this court has great empathy for the trial court and respondents. However, Code of Civil Procedure section 128.5 authorizes the imposition of sanctions to compensate a party or the party's attorney for reasonable expenses, including attorney fees, incurred as a result of the bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. The appellants' unrelenting, overzealous attack on the residuary gift to Lynch and O'Sullivan was, at times, of questionable legal merit. The mere fact that an action or tactic lacks merit, however, does not support an award of sanctions. (*Stell v. Jay Hales*

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[13]Ross did not assume representation of Hall until filing of substitution of counsel on or about November 13, 1992. Previously, Jeffers was also Hall's attorney.

*Development Co.* (1992) 11 Cal.App.4th 1214, 1233; *Javor v. Dellinger* (1992) 2 Cal.App.4th 1258, 1262.)

We are unable to sustain the court's determination that Jeffers prosecuted this action in bad faith. First we note that the court's finding of subjective bad faith was only as to Jeffers and did not include appellants. As to Jeffers, we believe that the lack of merit of his actions and tactics is attributable to his degree of competence and not to any proven bad faith.[14]

Appellants were heirs-at-law of McHenry and respondents were both confidants or fiduciaries who received the lion's share of a client's, or former client's multi-million dollar estate. It is undisputed that, at the time McHenry's final will and testament was drafted, he was suffering from marital problems and impaired vision, and was in a somewhat

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[14]The court appeared to have two separate views as to Jeffers, that he was either inept or that he acted in bad faith. Right before the close of evidence at the trial, the court in a frank comment to Jeffers stated "I have heard enough. You know, you don't -- I told you before, you don't have a clue as to what you are doing, you really don't."

At the hearing on Lynch's motion for sanctions, the court made the following statements: "I think you handled the case very ineptly. Well, you either handled in ineptly or in bad faith. Maybe, if you want, your choice as to what you did. I don't know. I don't think you are that inept. I think you did things, as I say, only in bad faith to try and manufacture some sort of a case. [¶] . . . [¶] Your conduct at the trial showed a complete lack of either understanding of the case or just a complete desire to obfuscate the factors in this case. [¶] . . . [¶] Your objections show absolutely no -- show no either understanding of the case or show a complete refusal to accept the facts of this case."

physically weakened condition following a heart attack and a stroke. The presence of such circumstances together with the presumption of undue influence which arises because of the relationship between respondents and McHenry belies the trial court's finding that appellants' actions and tactics while represented by Jeffers were conducted in bad faith, or solely for the purpose of unnecessary delay.

Accordingly, this is the rare case in which the injury resulting from the imposition of sanctions is sufficiently grave so as to amount to a manifest miscarriage of justice. (*Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299, 304.)

The trial court's orders awarding sanctions of $107,000 and $3,000, respectively, are reversed. In all other respects, the judgment is affirmed. Respondents are to recover costs on appeal.[15]

NOT FOR PUBLICATION

_____, J.

FUKUTO

We concur:

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[15]Our disposition of this matter makes it unnecessary to address the few remaining issues raised by the parties.

_____, P.J.
BOREN

_____, J.
GATES

Date entered: May 19, 1994

Nos. B 042160, b 044490

(Super.Ct.No. P 718653)

IN THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

Estate of SHELTON A. McHENRY,
*Deceased.*

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EDWARD S. HALL, et al.,
*Contestants-Appellants*
v.
THOMAS E. O'SULLIVAN, et al.,
*Petitioners-Respondents.*

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No. B 044645
(Super.Ct.No. P 718653)

BEATRICE CUNNINGHAM MOORMAN,
*Appellant*
v.
THOMAS E. O'SULLIVAN, et al.,
*Respondents.*

November 20, 1991

Shelton McHenry ("decedent") died July 14, 1987. Appellants, relatives of decedent, contested the validity of the will and codicil admitted to probate August 24, 1987. Appellant Hall's initial petition for revocation of probate was filed exactly one day after the 120-day period allowed under Probate Code section 380, now section 8270.[1]

The trial court granted summary judgments in the will contests to the two residuary beneficiaries of decedent's multimillion dollar estate, respondents Thomas O'Sullivan and John T. Lynch. O'Sullivan had been decedent's attorney for several decades and drafted the subject will; he, along with Howard K. Marvin, were named executors of the estate. Lynch had been the business manager of decedent's restaurants.

In appeal No. B042160, appellants Hall and Mills appeal from the summary judgment in favor of Lynch. In appeal No. B044063, Hall and Mills appeal from the summary judgment in favor of O'Sullivan and seek review of an earlier summary adjudication in favor of O'Sullivan as well as denial of their motion for reconsideration of the summary adjudication; appeal No. B044063 was consolidated with Appeal No. B042160. In Appeal No. B044490, Hall and Mills appeal from various orders made by the court following its rulings on the summary judgments. Finally, in appeal No. B044645, appellant Beatrice Cunningham Moorman appeals from the trial court's order denying her intervention in the will

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[1]The Probate Code has been amended since the rulings in this case; we will use the code section applicable at the time the trial court ruled. Unless otherwise indicated, all further statutory references are to the Probate Code.

contest.[2] We have been informed by counsel that there is at least one other appeal, No. B048301, by Hall and Mills from the trial court's order granting O'Sullivan's petition for extraordinary fees; that appeal is not now before us.

Because the procedural history is critical to understanding the rulings and arguments in this case, we set it forth in detail.

Procedural History

Decedent's 1984 will and 1985 codicil were filed August 3, 1987, a few weeks after decedent's July 14, 1987, death. The will, drafted by O'Sullivan and witnessed by his secretary and another employee called from his office to decedent's home, left substantial sums to decedent's wife and mother; these provisions were deleted in the codicil after his mother's death and his divorce from his second wife. Decedent left sums of mostly $5,000 to $15,000, to 27 individuals, including $5,000 to Hall and $10,000 to Moorman. He also left a handwritten provision for bonds to Howard K. Marvin and restaurants, since sold, to respondents. He left the substantial residue one-half to Lynch and one-half to O'Sullivan. The will, which contained a no contest clause, was signed by the testator only on the last page; his initials were found only by the few interlineations in the will.

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[2]This Division decided the appeal of another relative, Debra McDaniel, in an unpublished opinion filed May 24, 1990. We held that, under the law applicable at the time, the executor was under no duty to search for unknown heirs and therefore was not required to give Ms. McDaniel, the daughter of a beneficiary named in the will, actual notice of the probate proceedings. We therefore affirmed the trial court's order denying Ms. McDaniel's motion to set aside an order admitting to probate the subject will and codicil.

O'Sullivan and Marvin were appointed as executors. A minute order indicates the will and codicil were admitted to probate August 24, 1987, and an order so stating was signed by Judge Ann E. Stodden on August 26, 1987.

Appellant Edward S. Hall's petition for revocation of probate was filed December 23, 1987, 121 days from the August 24 minute order but within 120 days of the August 26 order for probate. Hall, who had received notification of the probate proceedings, was the only contestant in his initial petition. The only citation (similar to a summons) was to O'Sullivan and Lynch. The petition asked that the probate be revoked as to respondents' bequests on the grounds of unsoundness of mind and understanding, undue influence, fraud, and lack of due execution.

O'Sullivan demurred to the petition based on its not being filed within the 120 days allowed by sections 380 and 384. On February 12, 1988, the demurrer was sustained with leave to amend within 10 days.[3]

On February 19, 1988, Roy E. Dyas, another cousin of decedent (but not a party to this appeal), noticed a motion to set aside the order admitting the will go probate. He claimed the executor should have known of his relationship to decedent but did not give him notice. Appellant Mills filed a joinder with Dyas petition on March 4, 1988. At this point, the executors claimed Mills' joinder was deficient; they had no reason to know of either Dyas or Mills; and they objected Hall did not file an amended petition within the 10 days allowed by the court. The contestants claimed O'Sullivan purposely did not want to locate relatives not named in the will, arguing part of his plan was to preclude a contest by those named, who were subject to the "no contest" provision, and to discourage

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[3]Hall filed his amended petition February 26.

claims by those relatives not named by not notifying them of the proceedings. Judge Hubbell denied the motion by Dyas and Mills to set aside the order admitting the will to probate.

On March 16, 1988, Hall and Mills filed a second amended petition for revocation of probate.[4] The petition alleged the filing of the original petition was timely and, if not, time was extended by reason of O'Sullivan's fraudulent representations. Mills alleged he joined in the petition as an interpleader and as a known heir, "files the contest herein based on the time period of his joining herein to be within 30 days from the time he first had notice" of the probate. The prayer of the second amended petition asked that the will be revoked as to O'Sullivan and Lynch and that any property obtained by O'Sullivan and Lynch be held by them as constructive trustees for the heirs.

On April 7, 1988, O'Sullivan moved to strike the second amended petition, arguing the court had not given permission to amend twice. He also demurred to the second amended petition, again urging Hall's filing on the 121st day was untimely. He argued there was no extrinsic fraud that would extend the time for filing a will contest even if the allegations about his misconduct were true; that the alleged statements were not made to the contestants then before the court, and that Mills was not a "known" heir and was not even in Hall's original petition. O'Sullivan declared he told Moorman, to whom the alleged representations had been made, to seek her own legal counsel; he further declared that, even

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[4]Thereafter, Hall asked the court's leave to file the Second Amended Petition. On April 1, 1988, Judge Hubbell gave leave to file a second amended petition and to the first amended petition and O'Sullivan's demurrer thereto off calendar.

if the subject will were set aside, decedent's 1981 will similarly left the residue to O'Sullivan and Lynch.

The trial court overruled O'Sullivan's demurrer, denied his motion to strike, and gave him 30 days to answer. Lynch did not demur but instead answered the second amended petition on April 25, 1988.

On May 17, 1988, Hall filed a petition for partial distribution of the estate, a move now used by respondents to attempt to foreclose his contest. After acknowledging the will contest against O'Sullivan and Lynch, Hall requested that the court order distribution of most of the specific monetary bequest, including the $5,000 to Hall and $10,000 to Beatrice Cunningham Moorman. O'Sullivan objected to distribution of the bequest to Hall because he had contested the will and to Moorman, because she "apparently supported him by filing declarations in support of his contest." The order for partial distribution, filed July 12, 1988, stated the petition had been granted and ordered the various specific bequests, not mentioning the $5,000 to Hall. However, the record on appeal contains Hall's signed receipt on distribution as well as Moorman's cancelled check as a substitute receipt on distribution. The order was later corrected nunc pro tunc to include the distribution to Hall.[5]

In another procedural move important to the posture of the appeal, on May 27, 1988, O'Sullivan made a motion for severance and separate trial of the issue with respect to the alleged extension of time to file the contest. If the contest was

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[5]Later that summer, O'Sullivan as the executor asked that Lynch's creditor's claim against the estate for $140,000 in deferred compensation be granted. It was. O'Sullivan's law firm's creditor's claim of $21,232.75 for legal services through the date of death was also approved.

untimely and the untimeliness was not excused by his alleged extrinsic fraud, O'Sullivan urged that neither he nor the court need spend time on discovery or proof of any misdeeds alleged in procuring the will. At this time, evidence was being produced in discovery tending to show the will produced by O'Sullivan did not match the wishes of decedent, whom some said did not like either O'Sullivan or Lynch.

Judge Hubbell ordered the issue of extrinsic fraud severed and tried separately prior to trial of all other issues pertaining to the will contest; discovery as to the issues other than extrinsic fraud was stayed. Following that order, arguments regarding discovery matters escalated; a referee was eventually appointed for discovery purposes.

On February 3, 1989, Lynch filed a motion for summary judgment or, in the alternative, for summary adjudication of issues. The issues for which he sought adjudication were:

"ISSUE NO. 1: [¶] This will contest was filed one day late in violation of Probate Code Section 380.

"ISSUE NO. 2: [¶] The admission of decedent Shelton A. McHenry's ('McHenry') August 24, 1984 Will and April 20, 1985 Codicil (collectively the 'Will') to probate is conclusive as to Lynch, pursuant to Probate Code Section 384.

"ISSUE NO. 3: [¶] Lynch engaged in no conduct whatsoever which prevented the contestants, or any other interested party, from timely filing a contest of McHenry's Will.

"ISSUE NO. 4: [¶] This action is time-barred as to Lynch pursuant to Probate Code Section 380.

"ISSUE NO. 5: [¶] Lynch did not unduly influence McHenry in the execution of his Will, in that Lynch engaged

in no conduct whatsoever which relates to either the preparation or execution of McHenry's Will.

"ISSUE NO. 6: [¶] Lynch engaged in no acts of fraud in inducing McHenry to execute any will or inducing McHenry to make any testamentary disposition of his property upon his death."

Also on February 3, 1989, O'Sullivan filed a motion for summary adjudication of the following issues:

"ISSUE NO. 1: [¶] William Dean Mills ('Mills') is not a proper contestant in this action in that he failed to timely file a will contest pursuant to Probate Code Sections 370 and 380, and in that he failed to obtain leave to file and file a complaint in intervention pursuant to Code of Civil Procedure Section 387.

"ISSUE NO. 2: [¶] Even if Mills were granted leave to file a complaint in intervention pursuant to Code of Civil Procedure Section 387, such a complaint would be time-barred by Probate Code section 380.

"ISSUE NO. 3: [¶] Hall is estopped to assert the invalidity of the entire will, as Hall has validated the will by both taking and by petitioning for all other legatees and devisees to take under it (excluding the residuary legatees).

"ISSUE NO. 4: [¶] This court lacks personal jurisdiction to adjudicate property rights of those who have already taken under the will in that all heirs, legatees and devisees under the will (excluding the residuary legatees) were not issued and served with citations on the [p]etition for [r]evocation of [p]robate, as required by Probate Code Section 381.

"ISSUE NO. 5: [¶] The contestants have alleged that only the residuary clause of the will be invalidated, which

allegation is inconsistent with grounds of contest which attach the validity of the will in its entirety.

"ISSUE NO. 6: [¶] The first ground of contest (unsoundness of mind and understanding) must be dismissed.

"ISSUE NO. 7: [¶] The fourth ground of contest (lack of due execution) must be dismissed.

"ISSUE NO. 8: [¶] Even if Hall is ultimately successful in invalidating the residuary clause of McHenry's will, only that portion of McHenry's estate which Hall would otherwise take by intestate succession can be the subject of this action.

"ISSUE NO. 9: [¶] Pursuant to Probate Code Section 384, probate of the will is conclusive as to all heirs-at-law, devisees and legatees, except for Hall."

Both Lynch and O'Sullivan filed separate statements of undisputed facts and declarations in support of their motions. Further, they each joined in the other's motion. By contrast, contestants' initial opposition relied only on the contention there had been inadequate discovery, partly because of the bifurcation of proceedings. Following replies by Lynch and O'Sullivan, the contestants filed an additional reply and more points and authorities. This reply contained declarations of Moorman, Hall, and decedent's personal attendant and nurses.

Ms. Moorman's declaration detailed her experience with O'Sullivan and his apparent efforts in advising her against taking any action to contest the will. O'Sullivan allegedly sent Moorman to inform Hall and anyone else that if there were any questions to call O'Sullivan "as there was no way it could be contested." He dined with her on several occasions and called her not less than 18 times. She told him "practically every time" that she did not believe the will was correct but he assured her it was decedent's will and what decedent wanted

and that a previous will provided the same thing. She had trust and confidence in him and relied on his information. When she told him Hall did not think it was decedent's will, O'Sullivan told her to tell Hall he "did not have a chance if he contested the [w]ill because he had many witnesses to show that this was Mr. McHenry's intent, and for [her] to tell Eddie that if anyone contested it, he would lose his bequest in the [w]ill, and that it would make a judge really mad." After she and Hall consulted with their current attorney, they decided on December 23, 1987, to file the contest. Because she was in poor health and was expecting to have an operation in the near future, counsel informed them the contest would be filed by Hall "which would open the door so [she] could present [her] claim at a later date when [her] health was better." Absent O'Sullivan's representations, she asserted that a contest would have been filed earlier.

The gist of the declarations regarding the substance of the will contest was that the decedent, who had been in weak medical condition with poor eyesight, "thoroughly disliked" Lynch, resented O'Sullivan's bills, an considered him a business acquaintance and brunt of jokes, not a personal friend. Decedent had indicated other dispositions of his estate and would not have left such large sums to respondents. Terry Gillard, decedent's personal assistant since 1979, declared that immediately after decedent died, O'Sullivan contacted Gillard; since Gillard was the only person with the combination to decedent's safe, O'Sullivan "demanded that [he] open the safe for him. Mr. Lynch and Mr. O'Sullivan came to the apartment. Mr. Marvin [the other executor] was not present at this time. They took all of the important papers out of Mr. McHenry's safe and [he] noticed that they took one paper out and said, 'This is it.' [He] believed[d] that was the true will . . . ."

In additional points and authorities filed March 8, 1989,

the contestants argued O'Sullivan's declaration about decedent's signing of the will conflicted with his own secretary's deposition regarding whether decedent initialled the interlineations in the presence of the witnesses. The March 8 documents included decedent's hospital records from May 15, indicating his weak condition. O'Sullivan objected to the "additional reply" and stated he was not seeking adjudication of whether Hall was extrinsically defrauded into filing the contest late.

While the parties were filing their papers regarding the requests of Lynch and O'Sullivan for summary adjudication of summary judgment, appellant Beatrice Cunningham Moorman for the first time sought joinder with Hall in his petition for revocation of probate. She filed her joinder document on March 8, 1989.[6] Two days later, on March 10, 1989, Debra

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[6]In April 1989, Moorman filed a will contest in intervention and a declaration for order granting leave to intervene. She declared she did not file when Hall did because she was "very ill at that time and not in a position to undertake litigation." Respondents move to strike her joinder, filed one year and two months after expiration of the statutory time. On April 28, 1990, the trial court denied Moorman's attempt to intervene, finding Moorman had known for a long time about the proceedings and that she had the right to come in. The finding that Moorman's delay in filing was unreasonable is certainly supported by the record. Since the issues she raises are not new to the contest and since respondents have demonstrated no prejudice from her intervention, on remand the court should reconsider its order denying her intervention; we will reverse the denial of intervention in appeal No. B044645 to allow such reconsideration in light of the entire proceedings. (See *Estate of Harootenian* (1951) 38 Cal.2d 242, 246.)

McDaniel, whose appeal is discussed in footnote 2, supra, filed her motion to set aside the order admitting the will and codicil to probate. She was the daughter of decedent's first cousin and alleged fraud by O'Sullivan in not notifying all heirs.

Also on March 10, 1989, a hearing on the motions for summary judgment and summary adjudication was held by Judge Goldin, who apparently inherited the probate calendar from Judge Hubbell in 1989. On March 24, 1989, the court issued a minute order granting summary judgment in favor of Lynch and summary adjudication of issues one through nine in favor of O'Sullivan.

On March 31, 1989, O'Sullivan filed a motion for summary judgment. He relied on the court's order granting Lynch's summary judgment, arguing that since Lynch would take the entire residue pursuant to section 6148(b)[7] even if all allegations against O'Sullivan were true, the contestants could not be "interested persons" for the purpose of bringing a will contest and therefore the will contest should be dismissed.

Contestants filed motions for reconsideration of the March 24 orders granting summary judgment and summary adjudication. As to Lynch, counsel for contestants conceded that no one had accused Lynch of extrinsic fraud for extension of time purposes but asserted Lynch was in a conspiracy with O'Sullivan to defraud the estate and probate of the entire residuary clause as to both respondents may be revoked if the clause was affected by undue influence of fraud even if Lynch did not directly participate in any wrongdoing. In addition,

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[7]Section 6148, subdivision (b) provides in pertinent part: "If the residue . . . is devised to two or more persons and the share of a devisee fails for any reason, the share passes to the other devisees in proportion to their other interest in the residue . . . ."

contestants argued discovery had been stopped regarding the grounds for disputing the will itself, so Lynch's summary judgment should not have been granted. Contestants produced a declaration by Dr. Robert S. Helper, a professor of ophthalmology at UCLA who had examined decedent in 1984 and opined "it would be impossible for [decedent]" to read the 1984 will.

Lynch filed a declaration in opposition to contestants' motion for reconsideration. He asserted his frequent contact with decedent from the time he was hired in 1971 as general manager of decedent's restaurant operation until his amicable termination in 1987 when all of decedent's restaurants had been sold. Lynch claimed he, and not Moorman, arranged for funeral arrangements when decedent's mother died in December 1984. He disclaimed any "involvement whatsoever in the preparation or execution" of any will or codicil or any conspiracy with O'Sullivan either to prevent filing of any will contest or regarding procurement and execution of the will. Furthermore, on the date of McHenry's death, Lynch stated he met O'Sullivan at decedent's apartment; O'Sullivan's exclamation "here it is," noted by Terry Gillard, was upon finding an expensive Patek watch they were looking for; Lynch "did not see anything that even remotely resembled a [w]ill."

In response to Lynch's declaration, appellants filed several declarations. A declaration by Ruth Tullis McHenry, decedent's former wife, contradicted O'Sullivan and Lynch depositions regarding decedent's ability to read. Her declaration was supported by Dr. Gary Asano's declaration, in which the doctor of optometry who had examined decedent in 1984 to 1986, stated "it would have been impossible" for decedent to read a significant part of the 1981 or 1984 wills, as claimed by O'Sullivan.

With respect to decedent's view of his two residuary

beneficiaries, his former wife declared he "disliked John Lynch very much and he felt he had caused the downfall of his very successful restaurants. His most frequent statement was, 'I wish that I had never laid eyes on the man.'" As for O'Sullivan, decedent felt he "often took advantage of him due to the fact that he could not see, and [decedent] had to depend on O'Sullivan for his legal matters."

A declaration by Terry Gillard states O'Sullivan and Lynch arrived at decedent's apartment about 10 a.m. on the date of death. Gillard opened the safe for them; One of several envelopes of papers in the safe was labeled "IMPORTANT DOCUMENTS" and one was labeled "WILL." Gillard had seen these papers numerous times when opening the safe for the decedent to get his watch and gold cuff lings. O'Sullivan took the papers out of the safe and said, "This is it."

Contestants also filed replies to O'Sullivan's motion for summary judgment, arguing there was at least intestacy as to the residue. O'Sullivan's substantive reply centered on his argument that equity acts in personam, that there was no evidence of extrinsic fraud or conspiracy by Lynch, and therefore any extrinsic fraud by O'Sullivan cannot set aside a judgment as to the innocent Lynch, to whom the residue would go under section 6148(b). O'Sullivan concludes "Thus, even if Hall is successful in proving his allegations, "O'Sullivan's failed bequest would pass to Lynch and not by intestacy. [Hall] is no longer an 'interested person' within the meaning of Probate Code Section 380, this contest must be dismissed."

The trial court gave contestants the courtesy of a rehearing, denied the pleas for reconsideration, and on June 9, 1989, granted O'Sullivan's motion for summary judgment. The trial court observed that there was no valid will contest as to Lynch; if O'Sullivan loses, Lynch would get the entire

residue; and therefore contestants have no real contest to pursue.

On June 13, 1989, contestants filed a motion for reconsideration of the order granting Lynch's summary judgment. They also sought to vacate the summary adjudication, and to file a motion against the trial court pursuant to Code of Civil Procedure section 170.6. In addition, they filed a supplement to the second amended petition requesting enlarging the prayer to request revocation of the entire will.

On July 7, 1989, the court granted respondents' motion to strike the Code of Civil Procedure section 170.6 motion and denied contestants' motion to vacate the summary adjudication.

Numerous documents were filed in support of and opposition to these various motions. On July 12, 1989, contestants filed declarations by two medical doctors who had treated decedent; they both declared, contrary to O'Sullivan's version of the will-signing, that it would have been impossible for decedent to have read the will.

On July 24, 1989, summary judgments were entered for Lynch and for O'Sullivan. At a hearing on July 28, 1989, the court granted respondents' motions to strike the Supplement to the second amended petition filed June 13; quashed belated citations, denied the motion for reconsideration of the order granting Lynch's summary judgment, and awarded sanctions of $500 each to Lynch and O'Sullivan. The court continued O'Sullivan's motion to dismiss without prejudice contestants' petition for removal of executors and objections to the accounting. The order implementing those decisions was filed August 18, 1989, and is the basis for appeal No. B044490.

Contentions on Appeal

Respondents' basic argument is that the will contest,

filed on the 121st day, was fatally delinquent;[8] there was no extrinsic fraud by O'Sullivan allowing late filing of the contest; even if there was extrinsic fraud by O'Sullivan, it would not excuse Hall, Mills, or Moorman from their late filings; and, in any event, any extrinsic fraud by O'Sullivan has no bearing on the separate residuary bequest to the "innocent" Lynch, so the contestants have no pecuniary interest at stake and cannot contest the will. Moroever, respondents argue Hall was estopped from contesting the will in its entirety (on grounds of unsoundness of mind and understanding and lack of due execution) because under section 6100 the entire will must be revoked if one is not of sound mind and Hall, who did not serve citations on the non-residuary legatees and heirs-at-law and who had requested and accepted his $5000 bequest under the will, cannot then attack the will as a whole. Respondents berate the inadequacy and alleged unfounded hyperbole of the contestants' assertions and argue contestants cannot demonstrate the summary judgments were an abuse of the trial

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[8]As previously noted, Hall's petition for revocation of probate was filed 121 days from the August 24, 1987 minute order but within 120 days of the August 26, 1987 order for probate. Although the timeliness of filing the petition within 120 days of the August 26 formal order was raised below, appellants did not emphasize that issue on appeal. At oral argument, we asked the parties to provide further briefing on that issue. Having reviewed their briefs and the legislative history of section 380, we are convinced the Legislature intended to codify the portion of *Wolfson v. Superior Court* (1976) 60 Cal.App.3d 153, stating that the contest period starts running from the date the clerk enters the notation of admission to probate in the minute order, not from the subsequent formal order. The petition for revocation of probate in the case at bench was therefore filed one day late.

court's discretion.

Since O'Sullivan's principal arguments rely on the validity of Lynch's summary judgment, appellants first attack the rulings for Lynch. Appellants contend the stay order regarding discovery regarding the will's execution prevented them from discovering any evidence of Lynch's participation in procuring the will.[9] Furthermore, even if Lynch did not actively participate in either procuring the will or in the extrinsic fraud, appellants argue he is not entitled to summary judgment if O'Sullivan committed extrinsic fraud and the residuary clause should be set aside. Moreover, appellants argue the summary adjudication for O'Sullivan was erroneous: (1) Hall should not be estopped from challenging the will because of his petitioning for and receiving $5,000 when his petition conceded the existence of the will contest and he received a sum much less than intestacy; (2) Mills' intervention was informally granted and, in any event, he was known by the executor but not given statutory notice; and (3) Moorman should have been allowed to intervene since she provided no new grounds of contest, there had been extrinsic fraud, and she had been very ill when the initial contest by Hall was filed. Appellants emphasize the unfairness of a situation whereby an attorney can draft a will making him executor and substantial beneficiary and, even if the attorney procured the will by undue influence, can take his half of the residue if the other, "innocent" beneficiary does not seek to revoke the probate.

Discussion

This case presents a conflict in policy affecting probate

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[9]In one of his respondent's briefs, Lynch in "all fairness," agrees that the issue of whether he played any part in procuring the 1984 will "possibly touches upon matters regarding which discovery had been curtailed . . . ."

matters. On the one hand, the time limit for filing a petition for revocation of probate of a will "is jurisdictional. (See Prob. Code, § 384; *Estate of Smith* (1931) 214 Cal. 50 . . . .)" (*Wolfson v. Superior Court*, *supra*, 60 Cal.App.3d at p. 160.) "It is clear that there is a pervasive and dominant judicial and legislative theme that probate matters must be expeditiously handled to effect a prompt distribution of property to the decedent's designated beneficiaries and to avoid unnecessary delay and expense. [Citations.] In this context it is understandable why the Legislature limited the time within which will contests can be filed to relatively short periods. . . . The Legislature was undoubtedly aware that longer limitations periods heighten uncertainty over the validity of the will and result in increased expense to the parties. [¶] The date on which the will is admitted to probate serves as the bright line for the commencement of the 120-day period within which a postprobate contest can be filed." (*Estate of Horn* (1990) 219 Cal.App.3d 67, 71-72.) Thus, the "probate of a will is conclusive if not contested within 120 days after the will is admitted to probate." (*Estate of Sanders* (1985) 40 Cal.3d 607, 613.)

On the other hand, however, "[e]ven in the absence of a timely contest . . . a court may exercise its equitable jurisdiction to set aside orders and decrees of probate proceedings in cases of fraud or mistake. [Citations.]" (*Estate of Sanders*, *supra*, 40 Cal.3d at pp. 613-614; emphasis added.) The Supreme Court, in *Estate of Sanders*, *supra*, at page 614, then observed: "It is well settled, however, that 'only upon proof of extrinsic and collateral fraud can plaintiff seek and secure equitable relief from the judgment. A showing of fraud practiced in the trial of the original action will not suffice.' [Citation.]" (See also section 8007, operative July 1, 1991, which states an order admitting a will to probate, when final, is usually a "conclusive determination of the jurisdiction of the

court and cannot be collaterally attacked," but not if there is the "presence of extrinsic fraud in the procurement of the court order.") When a judgment or order has been obtained by fraud, the "'fraud is regarded as perpetrated upon the court as well as upon the injured party.' [Citation.]" (*Baker v. O'Riordan* (1984) 65 Cal. 368, 370.)

Moreover, courts are particularly vigilant where the alleged impropriety is by an attorney. Where the alleged undue influence is by the attorney who drafted the will and takes a substantial sum of the estate, "such a bequest invites invocation of the evidentiary presumption of undue influence. . . ." (*Estate of Lind* (1989) 209 Cal.App.3d 1424, 1430.) In such instances, even if the contestant cannot prove standing, when "it is plain" that the attorney "drafted the will in which he is named as executor and as a major beneficiary, the probate court may upon its own motion raise the presumption of undue influence and require [the attorney] to rebut the presumption. [Citations.} In such cases of possible abuse of the confidential relationship by attorneys, the probate court should raise the presumption sua sponte. Such exercise of undue influence by attorneys are especially egregious and thus require the closest scrutiny. [Citations.]" (Id. at pp. 1436-1437; emphasis added.)

Appellants did bring to the trial court's attention, by a petition filed only one day late, uncontested evidence that counsel for decedent drafted the will and placed himself as co-executor; called employees from his office to witness the will although decedents' employees were available; and became the beneficiary of half the substantial residue of decedent's estate. These facts alone might alert the trial court to investigate further. These concerns would have easily been before the probate court had a timely contest been filed. The question is whether the one-day delay precludes consideration of the underlying will contest.

We agree with respondents that appellants' papers were often sloppy, belated, and unduly repetitive. Each motion for reconsideration seemed to produce additional evidence that might well have been produced more expeditiously. Having read the record on appeal, we share the exasperation of respondents and the trial court with appellants' litigation procedures below.

Although we are concerned with the state of the record, in our view the record on appeal does raise a material issue of fact regarding extrinsic fraud by O'Sullivan vis-a-vis Hall. There is evidence O'Sullivan, who as executor was in a fiduciary relationship with the legatees (see *Bacon v. Bacon* (1907) 150 Cal. 477, 489), persuaded Moorman not to file a timely contest, thereby precluding her from a trial on the validity of decedent's will. (Cf. *Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 596-597.) Further, there is evidence O'Sullivan successfully sought to use Moorman to persuade others, including Hall, not to contest the will.

We do not think Hall's petitioning for and eventually accepting the $5000 specific bequest precludes his petition to revoke probate.[10] For example in *Bacon v. Bacon*, *supra*, 150 Cal. at page 479, plaintiff accepted $2,000 in a 1896 distribution of the estate; she instituted suit in 1899, successfully claiming the original will provided she would receive $10,000 and there had been a misreading of the provision. Hall brought the will contest to the attention of the court in seeking partial distribution, and stated the contest was as to the residuary clause and any specific bequests as to Lynch and O'Sullivan. Under the peculiar facts of the case at bench,

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[10]We have not been asked to and do not reach the issue of whether the $5,000 distribution to Hall was appropriate in light of his contesting the will.

Hall is not precluded from contesting O'Sullivan's and Lynch's methods of procuring the residuary clause and their specific bequests even if the specific bequests to Hall and others remain intact. (Cf. *Estate of Patmore* (1956) 141 Cal.App.2d 416, 420-421, where husband's election to take under the will in one state bound him elsewhere, the court stating, "One who accepts a beneficial interest under a will thereby adopts the whole will and renounces every right or claim that is inconsistent with the will. . . . he cannot hold a bequest or devise with one hand and shove it away with the other.") The alleged undue influence may have been directed at procuring the residuary clause and not necessarily the rest of the will and therefore only that part would be invalid. (See *Estate of Molera* (1972) 23 Cal.App.3d 993, 1001.)

As for any conspiracy between Lynch and O'Sullivan, the evidence before the trial court is scant. However, discovery of any involvement by Lynch in procuring the will, discovery precluded by the trial court's order severing the issues and staying discovery on all but extrinsic fraud, might tip the balance in favor of the inferences that now are mere suspicions. Therefore, the stay on discovery should be dissolved to allow full exploration of the issues. Only then can contestants adequately explore the possibility of Lynch's involvement.

Moreover, even if Lynch was not involved with O'Sullivan's alleged extrinsic fraud, the residuary clause is not necessarily conclusive where there is the "presence of extrinsic fraud in the procurement of the court order" (new section 8007, consistent with case law)., O'Sullivan repeatedly tells us that equity acts in personam and therefore the probate court, acting with its equitable powers, should not be able to touch Lynch unless he has joined in the extrinsic fraud. However, as Witkin observes, "modern statutes confer considerable in rem jurisdiction on courts of equity." (11 Witkin, Summary

of Cal. Law (9th ed. 1990), Equity, § 2, p. 680.) The probate court in its equitable role can decide to what extent O'Sullivan's misbehavior, if any, affected the bequest to Lynch. (But see *Estate of Stauffer* (1956) 142 Cal.App.2d 35, 43.)

Finally, we reject O'Sullivan's concept that, assuming Lynch can take, contestants are not "interested persons" since Lynch was entitled to the entire residue -- and since Lynch has not contested the will, the contest must be dismissed and O'Sullivan will take half the residuary estate. If O'Sullivan fraudulently procured the will, even if equity might allow Lynch to take his own half to he residue, the inequity of allowing O'Sullivan to take his half of the residue just because Lynch did not contest the will seems obvious.[11] To allow one to profit from his own misdeeds in this context would be inexcusable.

As to appeal No. B044490, respondents correctly assert that appellants have not raised the propriety of most of the August 18, 1989, order in their appellate briefs. Respondents also contend the orders are not appealable, but we need not reach that issue since appellants have abandoned any purported appeal of the August 18 order except as to the parts of the order dealing with the substance of the summary judgment motions, which were (however peripherally) addressed in appellants' briefs. We specifically affirm the award of sanctions to respondents. Although we decline to award the sanctions requested by respondents on appeal for this abandonment, we will order the parties to bear their own costs

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11 [11]We emphasize we are viewing this proceeding at the summary judgment stage and note that respondents deny any impropriety in the procurement of the will or in inducing contestants to delay in filing a contest.

on appeal even though this decision reverses the summary judgments granted to respondents.

The summary judgments for respondents in appeal No. B042160 are reversed. The matter is remanded to the probate court for further proceedings consistent with this opinion. The order in appeal No. B044490 is affirmed except as to the parts of the order dealing with the substance of the summary judgment motions. The denial of Moorman's intervention in appeal No. B044645 is reversed with directions to reconsider in light of the entire proceedings. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED

_____

We concur:

_____, Acting P.J.
GATES

_____, Acting J.
NOTT

Date entered: November 20, 1991

## APPENDIX C

Order Granting in Part and Denying in Part Rehearing

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION TWO

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Estate of SHELTON A. McHENRY,
*Deceased..*

EDWARD S. HALL et al.,
*Contestants and Appellants,*

v.

THOMAS E. O'SULLIVAN et al.,
*Petitioners and Respondents.*

No. B 074070 - FILED JUN 14, 1994
(Super. Ct. No. Soc 99996)

ORDER MODIFYING OPINION AND DENYING PETITIONS FOR REHEARING

THE COURT:

The opinion filed on May 19, 1994, in the above entitled matter is modified as follows;

1. On page 16 of the typed opinion, the final sentence on the page is modified to read:

After McHenry died, O'Sullivan contacted Moorman 18 to 25 times and tried to persuade her not to contest the will.

2. On page 39 of the typed opinion, the first sentence in the last full paragraph is modified to read:

Following appellants' motion for new trial, the trial court awarded additional sanctions of $3,000 to O"Sullivan, explaining that It was awarding only $3,000 in sanctions, rather than the $3,900 requested, because the filing of a motion for new trial is "almost routine."

The instant modification effects no change In judgment.

Appellants' petition for rehearing is denied.

Respondent Lynch's petition for rehearing is denied.

I would grant the petition for rehearing of respondent Lynch.

**APPENDIX D:**
Order of Supreme Court of California Denying Review

SECOND APPELLATE DISTRICT, DIVISION TWO,
No. B 074070, S040635

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

**IN BANK**

---

Estate of SHELTON A. McHENRY,
*Deceased..*

EDWARD S. HALL et al.,
*Appellants,*

v.

THOMAS E. O'SULLIVAN et al.,
*Respondents.*

FILED JUL 27, 1994

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Petition for review DENIED.

LUCAS

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Chief Justice

**APPENDIX E**

Order of Justice O'Connor Enlarging Time to File Petition

SUPREME COURT OF THE UNITED STATES
No. A-259

Edward S. Hall, et al.,
*Petitioners*

v.

Thomas E. O'Sullivan, et al.

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ORDER

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UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 24, 1994.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 14th
day of October, 1994

Supreme Court, U.S.
FILED
DEC 27 1994
OFFICE OF THE CLERK

No. 94-951

In The

# Supreme Court of the United States

October Term, 1994

IN RE ESTATE OF SHELTON A. McHENRY, *Deceased.*

EDWARD S. HALL, *et al.*,

*Petitioners,*

vs.

THOMAS E. O'SULLIVAN, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The California Court Of Appeal**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 94-951

In The

# Supreme Court of the United States

October Term, 1994

IN RE ESTATE OF SHELTON A. McHENRY, *Deceased.*

EDWARD S. HALL, *et al.*,

*Petitioners,*

vs.

THOMAS E. O'SULLIVAN, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The California Court Of Appeal**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## INTRODUCTION

The instant petition represents a misguided and ultimately futile attempt to fabricate an issue of constitutional dimension. Petitioners vigorously chant a number of homilies about legal ethics, attempting to tantalize this Court with purported questions of significant public interest. However, the actual record does not support consideration of any such issues. Moreover, they touch upon matters which are properly subject to exclusive

state regulation. In other words, no significant federal question is presented.

Apparently recognizing these deficiencies, petitioners attempt to weave a theme of "due process" throughout their argument. Yet, they give only lip service to this constitutional theory, and they never really explain how it actually bears upon the legitimate elements of this case. Their transparent attempt to exaggerate the issues and distort the record should not be taken at face value. Instead, a proper examination will disclose that there are no issues which warrant this Court's valuable attention.

## THE IDENTITY AND POSITION OF RESPONDENT LYNCH

As acknowledged in the petition, Shelton McHenry named two individuals to receive the residue of his estate. One was Thomas E. O'Sullivan, McHenry's attorney and the person who drafted his Will.

The second residual beneficiary was John T. Lynch, who had faithfully served as McHenry's business manager for more than fifteen years. Mr. Lynch, who was not an attorney, had absolutely nothing to do with the procurement or execution of McHenry's Will.

Unfortunately, due to the protracted duration of this will contest (pending since 1987), John Lynch never enjoyed a single penny from McHenry's estate. Mr. Lynch died of cancer on August 1, 1993. The undersigned attorneys now represent his widow and personal representative, Elizabeth Lynch, in connection with these

proceedings. His estate, as the real party in interest, hereinafter will be referred to simply as "Lynch."

Lynch opposes the instant petition for a number of reasons described below. However, in the event that this Court should decide to grant certiorari, Lynch requests that review be expressly limited to a consideration of McHenry's *severable* gift to O'Sullivan. The issues advanced by petitioners have no legitimate bearing on the separate gift to Lynch. (See *Estate of Molera*, 23 Cal.App.3d 993, 1001, 100 Cal.Rptr. 696 (1972); *Estate of Stauffer*, 142 Cal.App.2d 35, 41, 297 P.2d 1029 (1956).)

## STATEMENT OF THE CASE

Petitioners present a largely distorted and myopic view of what transpired in the proceedings below. Their Statement Of The Case contains a number of misleading inferences and omissions, if not outright misstatements, which induce a false impression of the relevant circumstances.

A few specific examples are described below in Argument. However, Lynch finds it unnecessary to provide an alternative Statement Of The Case. Mr. O'Sullivan is doing so in his own brief, which should be filed about the same time as this one. Therefore, in an effort to avoid unnecessary duplication, Lynch will simply rely on O'Sullivan's Statement Of The Case.

## SUMMARY OF ARGUMENT

Petitioners have failed to demonstrate a federal issue of sufficient importance to warrant consideration by this Court. The major thrust of their argument is devoted to public policy concerns vis-a-vis the regulation of attorneys and the disposition of decedents' estates – both of which are matters generally within the province of each state to deal with.

Still, petitioners add a secondary spin to their argument – one which is couched in terms of "due process." They imply that due process somehow calls for enhanced scrutiny of testamentary gifts to lawyers. Their reasoning in this regard is obscure at best. Evidently, petitioners are merely invoking the due process clause in a transparent attempt to present something they hope will pass as a federal issue. For a number of subsidiary reasons, this contrived effort must fail.

For one thing, it is difficult to fathom what protected rights or property have been taken, or how that was accomplished in violation of established due process standards. The cases cited by petitioners are clearly inapposite.

Furthermore, a proper review of the *complete* record discloses that petitioners received overly-generous consideration of their dubious claims. In fact, the California Court of Appeal directed that their issues of "fraud and undue influence" be addressed by the trial court *sua sponte*, thereby effectively excusing the fact that petitioners had failed to initiate a timely challenge to McHenry's Will.

Then, when the issues were brought to trial, petitioners utterly failed to sustain their position. Contrary to what they now infer, that failure had absolutely nothing to do with any unfairness or lack of adequate opportunity to be heard. Even if they had developed a viable case to present (which they did not), their attorney was simply unprepared to try the case effectively. The trial judge accurately characterized his performance as "inept."

Of even greater importance, the trial court expressly assured that its findings were not merely based on "clear and convincing evidence," but actually rose to the higher standard of "beyond a reasonable doubt."

Finally, even if the relevant circumstances do give rise to a colorable issue of significant concern, future problems of a similar nature have been averted by the enactment of new legislation which virtually eliminates the problem in California.

Based upon all of these considerations, Respondent Lynch respectfully submits that this case presents no question which is either properly before this Court, or which deserves any further attention at this point in time.

## ARGUMENT

### I.

### PETITIONERS HAVE FAILED TO PRESENT A SIGNIFICANT FEDERAL ISSUE WHICH PROPERLY JUSTIFIES THE ATTENTION OF THIS COURT

This Court's prerogative to review a state judicial ruling via writ of certiorari is defined by statute. (28

U.S.C. § 1257.[1]) The fundamental limitation is that any issue to be considered must be "federal" in nature. Moreover, that issue cannot be trivial or insignificant. There must be "special and important reasons" for granting review by certiorari. (*Rice v. Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897 (1955).)

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations.] 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. . . . " (*Id.* at 349 U.S. 74, 99 L.Ed. 901. See also, USSC rule 10.1(b) & (c).)

The basic structure of petitioners' argument may be viewed as a combination of two different elements; one reflecting considerations of public policy and the other

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[1] Section 1257 provides in relevant part as follows:
" . . . Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. . . . "

purporting to address an issue of constitutional magnitude.[2] In fact, neither component gives rise to a significant federal issue, regardless of whether taken individually or in combination with the other.

## A. THE PUBLIC POLICY ELEMENT:

The first theme advanced by petitioners is essentially a policy argument which pertains both to rules governing the disposition of decedents' estates, and also to standards for the regulation of attorneys. Notably, these are matters uniquely within the purview of each state to control and regulate.

For example, this Court has recognized that laws governing the disposition of a decedent's assets are essentially a matter of state concern, if not exclusively so.

> "Rights of succession to the property of a decedent, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. [Citations.]" (*Irving Trust Co. v. Day*, 314 U.S. 556, 562, 86 L.Ed. 452, 457 (1941).)

Obviously, similar principles extend to the regulation of legal practice. To be sure, this Court is free to promulgate rules of practice within its own domain. It also

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[2] Petitioners argue that " . . . [a]n augmented standard of review is . . . warranted under the Due Process clause *and* to protect the integrity of the bar – " (Petn. p. 36 (emphasis added).)

exercises supervisory authority over legal practice in all lower federal courts.[3] However, the corresponding standards of practice in a *state* court are plainly a matter of local concern.

Of course, this is not to say that the states may exercise these regulatory powers arbitrarily or unfairly. As addressed below, the overriding requirements of federal due process apply to insure basic fairness in the pursuit or administration of such state-created rights or privileges. (See, e.g., *Wilner v. Committee on Character & Fitness*, 373 U.S. 96, 10 L.Ed.2d 224 (1963), concerning the fairness of procedures for denying admission to a state Bar.)

By the same token, however, it is difficult to imagine that this, or any other federal court, would presume to impose its own views as to what those rights and privileges ought to be in the first instance. To do so would plainly violate the structural integrity of our federal system. (See dissenting opinion of Justices Harlan and Clark in the *Wilner* case, warning against this Court deciding matters which present something less than "a substantial federal question." *Id.* at 373 U.S. 112, 10 L.Ed.2d at 234.)

While perhaps intriguing from a purely academic standpoint, the policy arguments asserted by petitioners do not give rise to any significant *federal* issue.

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[3] Notably, the two cases cited by petitioners in this regard dealt solely with the exercise of such authority in *federal* tribunals. (*Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 95 L.Ed. 2d 740 (1987) and *Cuyler v. Sullivan*, 446 U.S. 335, 64 L.Ed.2d 333 (1980), both cited at Petn. p. 29.) In neither case did this Court propose to regulate the practice of law in a state court system.

## B. THE "DUE PROCESS" ELEMENT:

In an apparent attempt to overcome these deficiencies, petitioners weave into their argument a thread of "due process" – the second component of their argument. However, they do little more than intone the words "due process" time and time again, as if this were some magical incantation to invoke the powers of certiorari.

Petitioners never really explain how the principles of due process apply in this case. Nor do they identify what freedoms or property rights have been taken in ostensible violation of those principles. They merely complain about having supposedly been deprived " . . . of the opportunity to show impropriety and over-reaching [on the part of Attorney O'Sullivan]." (Petn. p. 34.) Not surprisingly, they cite no authority for the proposition that due process serves to protect such an "opportunity."

In marked contrast, petitioners do refer to a couple of decisions where significant personal rights had been placed at risk. For example, *Honda Motor Co., Ltd. v. Oberg* involved an award of punitive damages in the rather substantial amount of $5,000,000.[4] Likewise, *Jackson v. Virginia* arose from a federal habeas corpus proceeding in which the petitioner's very freedom was at issue.[5] Those cases have little apparent bearing in this case.

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[4] *Honda Motor Co., Ltd. v. Oberg*, ___ U.S. ___, 129 L.Ed.2d 336 (1994), cited at Petn. pp. 37-39.

[5] *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560 (1979), cited at Petn. pp. 36-37.

## II.

## THE "PUBLIC POLICY" COMPONENT OF PETITIONERS' ARGUMENT HAS BEEN SUPERSEDED BY A CHANGE IN CALIFORNIA LAW

As observed above, petitioners have asserted a theory about why and how an attorney should be prevented from taking under a Will which he/she was responsible for drafting. While perhaps interesting from an academic or political standpoint, this component of their argument fails to generate a significant federal issue.

Moreover, even if the Court were inclined to accept this case in order to deal with such policy issues, the entire topic is now a matter of past history in California. In 1993, the State Legislature enacted a number of substantial revisions to California's Probate Code. Among those was the enactment of section 21350 *et seq.*, which generally preclude testamentary gifts to persons responsible for the drafting of a decedent's Will. (The actual text of sections 21350-21355 is reproduced in Appendix "A" to this brief.)

Thus, California already has acted on its own initiative to deal with the perceived problem upon which petitioners rely so intensely. Although the new statute does not apply retroactively so as to affect the outcome in this case, it virtually eliminates the possibility that similar issues will arise in future proceedings. Therefore, it would be improvident for this Court to grant certiorari in order to address those same policy considerations. (*Rice v. Sioux City Cemetery, supra*, 349 U.S. at 74-80, 99 L.Ed. at 901-904.)

## III.

## EVEN IF A DUE PROCESS QUESTION WERE TO BE RECOGNIZED AS AN ABSTRACT PROPOSITION, THE PRESENT RECORD DOES NOT WARRANT INTERVENTION BY THIS COURT

Turning again to the somewhat ephemeral "due process" element of petitioners' argument, it is important to understand that they have provided an incomplete and distorted picture of the entire situation. Their petition omits mention of several important details, both procedural and substantive, and petitioners carefully attempt to diminish the significance of other telling facts. Included are the following, which easily dispel any possible hint of constitutional deprivation:

A. In effect, petitioners maintain that their claim of "undue influence" received inadequate consideration, both at the trial court and appellate levels. This contention is easily refuted by the actual record.

Notably, Petitioners filed their initial will contest beyond the applicable statutory deadline. After summary judgments had been granted against them on this basis, the State Court of Appeal gave them a second chance. Although recognizing that their will contest was untimely, the Court remanded proceedings so that Mr. O'Sullivan's conduct could be examined at an appropriate hearing – on the trial court's *own motion* if necessary. (See Petn. p. 54a.)

This ruling was based upon sound considerations of public policy. In a very real sense, petitioners were incidental and undeserving beneficiaries of the Court's concern. In any event, they got exactly what they wanted –

an opportunity to litigate their position in full. That they eventually failed to make anything of that opportunity is due to no fault of the system.

B. Petitioners then proceeded to complicate matters by bringing separate actions in connection with the same basic subject-matter. Among other things, they chose to litigate their ancillary claims of theft and forgery in a separate action to probate a "destroyed will."

In reality, petitioners had absolutely no evidence to substantiate either the existence or contents of any such "destroyed will." As a result, summary judgment was entered against them on those issues, and the Court of Appeal affirmed. (That decision, not supplied by petitioners, is reproduced in the Appendix to Mr. O'Sullivan's brief at pp. 1-11.) In particular, the Court of Appeal observed that petitioners' opposition was " . . . based on conjecture and speculation and [was] insufficient to raise a triable issue of fact as to the existence, distruction and contents of the purported will." (*Id.* at p. 10.)

In view of that ruling, the issues which remained for trial in the main action were now limited to whether McHenry's final Will had been procured by fraud or undue influence. Although petitioners still attempted to litigate the same issues of "forgery," etc., their offer of proof was properly rejected " . . . on the ground that the validity of the will had already been determined by the appellate court." (Petn. p. 26a.)

C. Although not entirely clear, it seems that the major thrust of petitioners' argument concerns both the

burden of proof and standard of review applied to measure the validity of their claims. In effect, they suggest that higher standards should have been imposed to more effectively police the conduct of attorneys, and also to vindicate the requirement of procedural due process (in some vague and inexplicable manner).[6] However, what petitioners curiously neglect to mention is that the trial court expressly *did* employ such a higher standard.

To begin with, the trial court correctly shifted the burden of proof to O'Sullivan, requiring that he present evidence to overcome the presumption of undue influence. After he had done so, it devolved upon petitioners to supply rebuttal evidence. Although they attempted to do so, their witnesses were so badly impeached, and their evidence so thoroughly refuted, that their case completely fell apart. As a result, the trial court observed that the presumption had not merely been rebutted on clear and convincing evidence, but that the validity of McHenry's Will had been established "beyond a reasonable doubt." (See the Appendix to Mr. O'Sullivan's brief at p. 26.)

D. Contrary to petitioners' repeated suggestion, that outcome had absolutely nothing to do with any

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[6] Incidentally, petitioners never raised this particular argument in any state court. Although they did argue generally (and confusingly) on "due process" grounds in their petition for review before the California Supreme Court, they barely mentioned anything at all about the standard of proof at trial, much less the standard of review on appeal. (See Appendix "B.") The instant petition may be denied on this basis alone. (*Cardinale v. Louisiana*, 394 U.S. 437, 438, 22 L.Ed.2d 398, 400 (1969).)

procedural unfairness. Even if they had developed a viable case to present (which they clearly did not), their attorney was simply too disorganized and unprepared to make an effective showing. The record clearly demonstrates that he required excessive amounts of time to frame each question, and that he stumbled along without any apparent plan or direction. As a result, the Court of Appeal ultimately found that " . . . the lack of merit of his actions and tactics is attributable to his degree of competence and not to any proven bad faith. [Footnote omitted]." (Petn. p. 33a.)

E. Finally, although petitioners attempt to imply that O'Sullivan totally dominated the disposition of McHenry's estate, they neglect to mention that there was a second, independent executor keeping watch over the situation. That second executor was Howard Marvin, who stood to recover no part of the estate residue. (He had received a specific bequest in the relatively modest amount of $100,000. See Petn. pp. 24a-26a.)

In effect, Mr. Marvin acted as a neutral and independent observer. He retained his own attorney and together they monitored all proceedings to ensure that Shelton McHenry's true wishes were carried out.

In other words, this is clearly not the sort of case where a wayward attorney managed to take complete control of a client's estate, without oversight or scrutiny from any quarter. Petitioners' suggestions to the contrary are simply without support in the record.

## CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the instant petition for writ of certiorari be summarily denied. However, should this Court find reason to grant the writ, Respondent Lynch respectfully requests that review be expressly limited to the residuary gift in favor of Shelton McHenry's lawyer, Mr. O'Sullivan. Apropos to this latter point, the Court of Appeal expressed these salient comments in its decision:

> "Appellants [petitioners] conveniently disregard the fact that Lynch denied any knowledge of or participation in the procuring of the contested will and codicil – or any other will for that matter – and the trial court found no hint of participation, much less fraud or wrongdoing on his part. Since there is substantial evidence to support the trial court's finding, the presumption of undue influence was never triggered with respect to Lynch. [Citations.] It is appellants who failed to sustain their burden of proving undue influence." (Petn. p. 22a.)

Respectfully submitted,

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# APPENDIX "A"
## California Probate Code
## Sections 21350-21355

## PART 3.5

## Limitations on Transfers to Drafters and Others

[Added Stats 1993 ch 293 § 8 (AB 21).]

Section

21350. Limitations on transfers to drafters and others.
21351. Exemption prerequisites.
21352. Limitation on liability.
21353. Effect of failure of transfer.
21354. Statutory supremacy.
21355. Effective date.

**§ 21350. Limitations on transfers to drafters and others.** (a) Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following:

(1) A person, including an attorney, conservator, or other person having a fiduciary relationship with the transferor, who drafted, transcribed, or caused to be drafted or transcribed, the instrument.

(2) A person who is related by blood or marriage to, is a cohabitant with, or is an employee of, the person who drafted, transcribed, or caused to be drafted or transcribed, the instrument.

(3) Any partner or shareholder of any partnership or corporation in which any person described in paragraph (1) or (2) has a 10 percent or greater ownership interest,

and any employee of any such person, partnership, or corporation.

(b) For purposes of this part:

(1) "Disqualified person," means a person specified in paragraph (1), (2), or (3) of subdivision (a), but only in cases where Section 21351 does not apply.

(2) "Relative by blood or marriage" of a person means all of the following:

(A) The person's spouse or predeceased spouse.

(B) Relatives within the third degree of the person, of the person's spouse, and of any predeceased spouse of the person.

(C) The spouse of any person described in subparagraph (B).

In determining any relationship under this subdivision, Sections 6406, 6407, and 6408 shall be applicable. Added Stats 1993 ch 293 § 8 (AB 21).

**§ 21351. Exemption prerequisites.** Section 21350 does not apply if any of the following conditions are met:

(a) The transferor is related by blood or marriage to, or is a cohabitant with, the person who drafted, transcribed, or caused to be drafted or transcribed, the instrument.

(b) The instrument is reviewed by an attorney not related to, or associated with, the drafter or the beneficiary of the transfer otherwise made invalid under Section 21350 who (1) counsels the client (transferor) about the nature of his or her intended transfer and (2) signs and

delivers to the transferor and the drafter a certificate in substantially the following form:

"CERTIFICATE OF
INDEPENDENT REVIEW

I, _____, have reviewed
(attorney's name)

_____ and counseled my client,
(name of instrument)

_____, on the nature of the transfer,
(name of client)

or transfers, of property contained in such instrument. On the basis of this counsel, I conclude that the transfer, or transfers, in such instrument that otherwise would be invalid under Section 21350 of the Probate Code are valid because such transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

_____ _____"
(Name of Attorney) (Date)

(c) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4. (d) The court determines, upon clear and convincing evidence, excluding the testimony of any person described in subdivision (a) of Section 21350, that (1) the transfer was not the product of fraud, menace, duress, or undue influence and (2) based upon all the facts and circumstances, which shall be made known to the court, the court finds that it is fair, just, and equitable to all interested persons to allow the transfer. If the court finds that the transfer was the product of fraud,

menace, duress, or undue influence, the disqualified person shall bear all costs of the proceeding, including attorney's fees. (e) Subdivision (d) shall apply only to instruments executed on or before July 1, 1993. Added Stats 1993 ch 293 § 8 (AB 21).

**§ 21352. Limitation on liability.** No person shall be liable for making any transfer pursuant to an instrument that is prohibited by this part unless that person has received actual notice of the possible invalidity of the transfer to the disqualified person under Section 21350 prior to making the transfer. A person who receives actual notice of the possible invalidity of a transfer prior to the transfer shall not be held liable for failing to make the transfer unless the validity of the transfer has been conclusively determined by a court. Added Stats 1993 ch 293 § 8 (AB 21).

**§ 21353. Effect of failure of transfer.** If a transfer fails under this part, the transfer shall be made as if the disqualified person predeceased the transferor without spouse or issue. Added Stats 1993 ch 293 § 8 (AB 21).

**§ 21354. Statutory supremacy.** This part applies notwithstanding a contrary provision in the instrument. Added Stats 1993 ch 293 § 8 (AB 21).

**§ 21355. Effective date.** This part shall apply to instruments that become irrevocable, or are executed by persons dying, on or after September 1, 1993. Added Stats 1993 ch 293 § 8 (AB 21).

# APPENDIX "B"
## "Due Process" Argument From Petition For Review In The California Supreme Court

Sup. Ct. No. P 718653

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

| | |
|---|---|
| ESTATE OF<br>SHELTON A. McHENRY,<br>Deceased. | NO. BO 74070 |
| EDWARD S. HALL and<br>WILLIAM DEAN MILLS,<br>Contestants and<br>Appellants,<br>v.<br>THOMAS E. O'SULLIVAN<br>and JOHN T. LYNCH,<br>Defendants and<br>Respondents. | |

PETITION FOR REVIEW
OF DECISION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO

THOMAS J. JEFFERS, JR.
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Attorney for Appellants,
Edward S. Hall and
William Dean Mills

[Preceding Arguments Omitted]

* * *

those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and *void." Hampton v. Super. Ct.* (1952) 39 C 2d 652, 655-656, 242 P. 2d 1, 3: *Frankel v. Four Star Int'l Ind.* (1980) 104 CA 3d 897, 902, 163 CR 902; *Coffee-Rich, Inc., v. Fielder* (1975) 48 CA 3d 990, 998, 122 CAR 302. *Eisenberg, Horvitz and Wiener on Appeals.* Page 14-16

On Page 23 of the November 1991 Opinion, the Appellate Court stated, "Such exercise of undue influence by attorneys are especially egregious and thus *require the closest scrutiny."* Closest scrutiny should mean any evidence to show fraud in the procurement of the attestation of the will, not informing the client pursuant to the *Witt* case as well as the New York *Putnam* case. The Doctrine of "Law of the Case" holds that any ruling in an appellate court opinion that is "necessary" to the court's decision must be followed in all subsequent proceedings in the action, whether in the trial court or on a later appeal. *Clemente v. State of California* (1985) 40 C 3d 202, 211-212, 219 CR 445.

Here it appears that it is the law of the case that the court make the closest scrutiny of O'Sullivan's conduct. Neither the appellate court, nor the trial court did that.

## ARGUMENT III

## THE COURT DENIED PROCEDURAL DUE PROCESS

The court would not allow contestants sufficient time to prove their case and would not allow testimony that happened in 1986 and 1987, yet he allowed O'Sullivan to

go back to 1960 and produce earlier drawn wills. If fraud is involved, every year should be important. There was not time allowed for many important witnesses to show the fraud. The judge would not allow testimony of the forged initials on the will or testimony that one bequest of a $100,000.00 bond was actually paid with 20 - $5,000.00 bearer bonds which were not even inventoried in the estate, which meant that O'Sullivan was cheating the government as well as the true beneficiaries.

The trial court did not understand that O'Sullivan and Lynch were not the primary beneficiaries of the former wills, but were only alternate beneficiaries.

Once Bernice died, which was August 10, 1983, Mac became closer to his family and remembered them from early days and re-did his own will, keeping his family in mind. His family became very important to him.

There was no time in the trial to bring out that "Terry Gillard" was like a son to Mac. Every witness on the pretrial list had been told this by McHenry.

There was no time to bring out that his cousins, Archibald and Howard were really like brothers because Mac's father died when he was very young and he was raised by an uncle and aunt with these two cousins, who he often referred to as brothers.

McHenry had a 15 carat diamond ring he was going to leave to his wife, Ruth, whom he liked very much. Instead, O'Sullivan and Lynch ended up with it which is certainly contrary to anything the decedent would want (Query: Why would a businessman leave a woman's 15 carat diamond ring to two men to share?)

The case consisted of a race to put on a 10 day trial in two one-half days with the defense taking the entire two one-half days first alotted.

Fourteen people were prepared to testify that McHenry told them about his will and which items he was bequeathing to them. McHenry was not a blow-hard.

This is a case where a sophisticated attorney has gone bad. Where there are indications that the drafting attorney is engaged in fraud, the court should allow time for the closest scrutiny. The judge should not protect the perpetrator by attacking the contestants' attorneys. The court should have been patient and heard all of the testimony contestants wanted to put on.

The Appellate Court in their opinion stated in November of 1991 that the court should engage in the closest scrutiny. But they did not do it. Instead they limited the time and made it difficult for the contestants to prove even their basic case. Any testimony showing the relationship of McHenry, O'Sullivan and Lynch should have been allowed.

The contestants were entitled to procedural due process, in that they were entitled to a fair hearing, as mandated by the Constitution.

The court said in *In re Buchman's Estate* 123 Cal. App. 2d 546, 267 P. 2d 73, that "when the Constitution requires a hearing it requires a fair one before a tribunal which meets established standards of procedure, which is the fair, orderly, and deliberate method by which matters are litigated."

In this case Judge Ross did not allow sufficient time to try the case and therefore the matter should be sent back for a new trial.

*Probate Policy No. 3:601(2) does* provide that if a trial will take more than two afernoons it should be sent to Department 1.

It says:

"2. Other Contested Matters

When at issue, other contested matters with an estimated trial time of more than two afternoons will be set for a mandatory settlement conference in Department 5. If the matter cannot be completed in two afternoons, it will normally be transferred to Department 1 for trial. Before a matter is transferred to Department 1 all discovery and other law and motions must be completed."

## CONCLUSION

The Appellants respectfully request that the Court accept this case for review, and refer this case back to the trial court for a full and adequate trial with sufficient time to bring out all of the facts and conduct that was not permitted, particularly where the attorney drafted the will placing himself as a principle beneficiary, executor, and in complete control of a blind, infirm client whose estate

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(3)

Supreme Court, U.S.
FILED
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No. 94-951

In The

# Supreme Court of the United States

October Term, 1994

IN RE ESTATE OF SHELTON A. McHENRY, *Deceased.*
EDWARD S. HALL, *et al.*,

*Petitioners,*

vs.

THOMAS E. O'SULLIVAN, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The California Court Of Appeals**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## PARTIES

The parties to the proceedings below were Petitioners Edward S. Hall and William Dean Mills, and Respondents Thomas E. O'Sullivan and John T. Lynch. Lynch passed away during the course of these proceedings, and his wife, Elizabeth Lynch, as personal representative of his estate, thus became a party below.

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## INTRODUCTION

To attain review in this Court, the temptation to exaggerate or misconstrue the record in the lower courts must be enormous. Petitioners here have yielded to that temptation in the hope of gaining the Court's attention.

The actual showing by Petitioners in the lower courts was repeatedly characterized by conjecture, innuendo and speculation. The courts below heard and considered Petitioners' evidence, and found it to be unreliable, not credible and on occasion, "made up." Petitioners urged the courts below, and now urge this court to hold that because Respondent in this will contest is an attorney, the courts are required to treat conjecture, innuendo and speculation with more deference than contradictory direct evidence.

The California courts' acceptance of reliable, rather than patently unreliable, evidence is the real basis for Petitioners' claim that their right to procedural due process has been abridged. The claim is outlandish.

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## STATEMENT OF THE CASE

### 1. FACTUAL SUMMARY

Shelton A. McHenry, a prominent and successful Los Angeles restauranteur, passed away in 1987. He left no wife, no children, no parents, brothers, sisters, aunts or uncles. His closest living relatives consisted of a small group of cousins. McHenry died testate.

In his will, McHenry followed the seasoned pattern of distribution of his property to which he had adhered firmly for more than 35 years, and through the more than dozen versions of his will prepared in that time. McHenry named numerous beneficiaries, including gifts to some of his friends and his cousins of specific items of personal property or amounts of money. However, the bulk of McHenry's estate, the residue, was bequeathed to individuals, neither friends nor relatives, but employees and professionals with whom he had worked most closely in his businesses.

In the early versions of McHenry's wills, which were in evidence in this matter, the number of employee beneficiaries of the residue of his estate was considerable. As McHenry grew older, as he wound down his business affairs and as individuals left his employ, the number of named residuary beneficiaries dwindled until, at the time of his death, there were only two: Respondent John T. Lynch, McHenry's business manager of 15 years, and Respondent Thomas E. O'Sullivan, his lawyer since the early 1950's. O'Sullivan was also the draftsman of McHenry's will.

Petitioner will contestants were two remote cousins of McHenry who had enjoyed little contact with him in his lifetime. Though certain family members claimed to have been close to McHenry, McHenry rarely saw, or spoke of, any of his relatives. He had not spoken of a will to any of them. None were familiar with McHenry's choices or pattern of distribution of his estate; none were familiar with the circumstances under which his will was prepared, or of its content. Nonetheless, the Petitioners alleged virtually every conceivable manner of fraudulent

activity by Lynch and by O'Sullivan in the procurement of the will.

Belying the premise that McHenry had been unduly influenced in preparing his will was a rich body of documentary evidence of the manner in which his wills had been conceived and prepared over the years. McHenry and his first wife Bernice (who predeceased him) were unfailingly meticulous and definite in their estate planning. Over the period McHenry was represented by O'Sullivan, McHenry's will was modified more than a dozen times.

O'Sullivan never participated in the McHenry estate planning other than as a tax advisor and draftsman. McHenry and Bernice (when she was living) gave O'Sullivan extensive and detailed handwritten or typewritten instructions concerning who was in or out of their will, and for what or how much. Numerous original exemplars of the written attention given by the McHenrys to the minutia of their estate plan for the revisions of their wills were in evidence.

Neither Lynch nor O'Sullivan were beneficiaries in the earliest wills prepared for McHenry by O'Sullivan. The residuary beneficiaries in those wills were the then-current restaurant managers and other key personnel retained by the McHenrys. Lynch was unnamed in any McHenry will until he became the McHenrys' restaurant manager in 1972. Bequests to O'Sullivan originated first in the 1960's as modest and contingent, later as modest, and later still as more substantial, with the attrition in the number of residuary beneficiaries designated by McHenry.

Over the years, as he became named a beneficiary of their estate, O'Sullivan addressed the propriety of his preparation of the McHenrys' wills with them on several occasions, and suggested that another individual might prepare their wills. The McHenrys, however, were intensely private individuals who had no direct involvement with lawyers other than O'Sullivan for all the years he represented them. The McHenrys wanted no other lawyer preparing their will despite having been advised, and being aware of, the conflict.

Through the many years and the many changes, there was an almost absolute consistency in McHenry's design of his estate plan. Before her death in 1981, McHenry and his first wife, Bernice, left the entirety of their estates to one another. In the event there were no survivor, with immaterial exceptions, modest specific cash bequests were made to relatives, gifts of personal property were made to friends, and the residue of the estate was left to key employees and retained professionals. As the key employees or professionals employed by McHenry came and went over the years, they would be added or omitted accordingly.

By 1984 and 1985, when McHenry's final will and codicil were prepared, McHenry had suffered a number of setbacks to his health. His vision had degenerated, he had suffered a stroke, and suffered from various ailments. Despite these conditions, according to McHenry's personal physician and others, McHenry's cognitive capacity was unimpaired, and he remained attentive to his affairs, including his estate planning objectives.

After McHenry's will was admitted to probate, the Contestant cousins, discontent with their treatment in McHenry's will, filed their will contest, commencing it one day after expiration of the 120 day period of limitations for filing will contests in California. Thereafter, Petitioners maintained a relentless and slanderous offensive against Lynch and O'Sullivan for more than seven years of litigation. Some seven separate actions attacked the will, all unsuccessful. In them, both Respondents were accused of fraud and conspiracy, destruction of McHenry's "true will" and sundry other fiendish conduct. At least thirteen notices of appeal were filed with the California Court of Appeal, five of which resulted in written opinions.

The first written opinion of the California Court of Appeal of significance here was rendered in an appeal from the granting of O'Sullivan's motion for summary judgment in the will contest, which motion had been made on the ground that the statute of limitations for will contests barred Petitioners' claim. In that Opinion (attached as Appendix Two to the Petition for Writ of Certiorari), the Court of Appeal reversed the summary judgment, citing a presumption of undue influence in transactions between lawyers and clients, and holding that the trial court was obliged to apply "the closest scrutiny" in matters involving the possible abuse of a confidential relationship by attorneys. The Court of Appeal remanded the matter for a trial on the merits on the issue of undue influence.

As the will contest thus proceeded toward trial of the issue of undue influence, another action was filed by Petitioners and others in a less conventional attack on the

will. In this action, Petitioners attempted to probate a "lost or destroyed will" of McHenry, which purported will, they alleged, omitted the gift of the residue to Lynch and O'Sullivan. In this action, Petitioners averred the existence of another, later, will than that which had previously been admitted to probate, the supposed provisions of which will were known to the proponents of that will by "osmosis." Lynch and O'Sullivan were accused of stealing this "true will" of McHenry, and altering or destroying it, purportedly subverting McHenry's real intent of leaving his estate to family members.

In the "destroyed will" action, O'Sullivan moved for summary judgment, on the ground that there was no witness, or other evidence, of the existence or content of the supposed "true will," or of the destruction or alteration of such a will by Respondents. In Petitioners' opposition to the motion, they proffered virtually identical circumstantial "evidence" of supposed misconduct by Lynch and O'Sullivan as that which Petitioners attempted to reoffer and reargue at the trial of the will contest.

The motion for summary judgment in the "destroyed will" action was heard, and granted, by Judge Edward M. Ross, the Presiding Judge of the probate departments in Los Angeles County Superior Court. Petitioners appealed to the California Court of Appeal, which affirmed (The Opinion of the Court of Appeal in the "destroyed will action" accompanies this Brief in Opposition as App. 1-App. 11). Affirming the judgment of the trial court, the Court of Appeal specifically held Petitioners' opposition to the motion (consisting of that proffered circumstantial evidence):

> to be based on conjecture and speculation and insufficient to raise a triable issue of fact as to the existence, destruction and contents of the purported will. (App. 10).

Remaining to be resolved was the trial of the will contest on the issue of undue influence.

Eventually, in November and December, 1992, the trial occurred. In trial, the court adopted Petitioners' position that O'Sullivan had a rigorous burden of proof, and concluded that it had been met:

> This court agrees with [Petitioners] that, in order to prevail, O'Sullivan was required to rebut the presumption by no less than 'clear and satisfactory' or by 'clear and convincing' evidence. Though there is some uncertainty whether the legal standard requires O'Sullivan to produce 'satisfactory' or 'convincing' evidence, the distinction, if any, is of no import here, since the Court concludes that O'Sullivan offered evidence which rebutted the presumption under either standard, and in fact *did so to the even higher standard of 'beyond a reasonable doubt.'* [emphasis added] (App. 26).

The court made every effort to view the evidence in a light favorable to the Petitioners. The court explained:

> In exercising its obligation to examine the circumstances involved in the gift to O'Sullivan, the Court undertook to consider not only the evidence offered by the parties, but also what might have come into evidence despite any deficiencies in the form or substance of presentation of evidence by [Petitioners'] counsel or what might have been presented if [Petitioners'] original counsel had been more adept. (App. 25).

The trial court, in a 32 page Statement of Decision (attached to this Brief in Opposition as App. 12-App. 44), reviewed and commented extensively on the evidence. The court found, based on the evidence, that the residuary gifts made by McHenry were of his own volition. The court further found, despite the respective relationships of O'Sullivan and Lynch to McHenry, there to have been no evidence of any kind of fraud or undue influence, nor evidence presented "that would raise an independent inference or suspicion, let alone proof" of fraud or undue influence by either of them. (App. 43). Instead, Judge Ross characterized the action as a personal vendetta by counsel for Petitioners (attorney Thomas J. Jeffers, Jr.) against O'Sullivan.

Petitioners, after unsuccessfully moving for a new trial, appealed anew to the California Court of Appeal, and the matter was assigned to the same three-member panel which had remanded the matter to the trial for "the closest scrutiny." In their briefs, Petitioners essentially urged the California Court of Appeal (as they now ask this court) to reweigh the evidence offered at trial, and in particular to reconsider factual issues which had long since been resolved in the "destroyed will" action.

Ignoring the applicable rules of appellate practice, Petitioners presented the California Court of Appeal a rather one-sided view of the record, mentioning only those matters which they evidently thought tended to indicate wrongdoing by Lynch and O'Sullivan. The appellate panel commented:

> In making their arguments, appellants give lip service to the substantial evidence standard. Yet those portions of the record purportedly

> establishing fraud and undue influence are summarized in vivid detail, to the exclusion of much of the evidence favoring respondents. (Pet. App. 17a).

The Court of Appeal again affirmed, declining to reconsider determinations which had been finally resolved in the "destroyed will action" (See, Petition, page 27a). The court held, among other things, that:

> [S]ubstantial evidence supports the trial court's finding that O'Sullivan sustained his burden of proving by clear and convincing evidence that no undue influence was brought to bear in connection with the challenged residuary clause. (Pet. App. 20a).

In so holding, the Court of Appeal reviewed the procedural history of the case and the evidence at length to support its conclusion that the heightened standard of proof applicable to O'Sullivan at trial had been met. The Court, further, commented on its impression that Petitioners' "unrelenting, overzealous attack on the residuary gift to Lynch and O'Sullivan was, at times, of questionable legal merit" and on the "multiplicity of meritless contentions" raised by Petitioners in their appeal. (Pet. App. 32a).

The California Supreme Court, appropriately, denied review.

## 2. EXCEPTIONS TO THE PETITIONERS' STATEMENT OF THE CASE

In their Statement of the Case, naturally crafted to create the impression of procedural unfairness in the courts below, Petitioners pick very selectively from the

record, omitting mention of or discounting evidence supporting the judgment, in an effort to create the impression that the trial court weighed the evidence incorrectly. As in their brief in the courts below, Petitioners have made a number of factual assertions which are either subtly or are plainly inaccurate, or which consist of mere argument about the inferences Petitioners wish the trial court would have drawn from their "evidence." Without the time or space to identify and comment fully on each instance of disputed matter in the Petitioners' Statement of the Case, Respondents will discuss only several.

Early on in their Petition, Petitioners discuss the reversal by the California Court of Appeal of the summary judgment based on the statute of limitations for will contests, making detailed reference to so-called "undisputed evidence of extrinsic fraud by O'Sullivan" (Petition, page 4) as having been mentioned by the Court in its Opinion. The impression clearly intended is that there was undisputed evidence of fraud or undue influence which was ultimately ignored by the lower court. Such clearly was not the case.

The motion for summary judgment underlying that Opinion was based on a number of discrete issues, and the evidence offered by O'Sullivan in that motion was naturally limited to those issues. Petitioners proffered the "undisputed evidence" in opposition to the motion, which evidence O'Sullivan considered not apposite to the issues on which the trial court would rule (a position with which the trial court agreed). In any case, for O'Sullivan to have disputed the evidence, even if relevant, would have created a triable issue of fact, and would

have been self-defeating. Thus, the fact that certain evidence was undisputed for the purpose of that limited proceeding is hardly availing. At trial, the premise that there had been any undue influence or fraudulent conduct on the part either of O'Sullivan or Lynch in the procurement of the will was found to have been entirely rebutted by evidence beyond a reasonable doubt.

Petitioners elsewhere state that the trial judge granted O'Sullivan "unusual deference" in permitting presentation of the bulk of his testimony in the form of a 31 page sworn statement (Petition, page 7). This point is misleading because, (1) the trial court ordered the parties to consider ways to expedite presentation of evidence, suggesting summaries of testimony in written form (a common practice in many courts designed to economize precious trial resources), and (2) O'Sullivan submitted to extensive cross-examination on the content of his written statement and on other matters. In addition, the trial court specifically noted that O'Sullivan's testimony had been corroborated by the documentary evidence in the case.

In a manner more in the nature of argument than of historical perspective, Petitioners state that "drastically changed circumstances . . . put continuation of any such 'patterns' " in McHenry's estate planning "in question." Why the event of a heart attack, vision loss, or the like should necessarily have affected a donative philosophy followed over a thirty-plus year span is entirely unclear; the trial court and the Court of Appeal each commented on the evidence concerning McHenry's condition when he executed his will and codicil, and concluded differently.

Petitioners' comment that the court "refused to find relevance in conduct by both McHenry and O'Sullivan circumstantially contradicting O'Sullivan's version of events" apparently refers to the proffered evidence by counsel Jeffers that when McHenry signed his will in 1984, he thought he was signing divorce papers. In fact, the trial court did not comment that such evidence was irrelevant, but that the "evidence" was simply not believed by the court. In considering that particular evidence, the court was clearly mindful of procedural due process:

> Besides the weakness of the evidence, the premise that McHenry signed a will when he thought he was signing divorce papers, was highly suspect. Though this action had been pending for more than five years, and though the [Petitioners] had long been familiar with the witnesses offered to support their theory, such premise was not mentioned by [Petitioners] in discovery, and, indeed, did not emerge until the time of trial. ¶ It is apparent to the court that, in this connection, Mr. Jeffers made up the trial as he went along. Mr. Jeffers' statement that, after five years he had just realized that O'Sullivan had slipped a will in amongst divorce papers was nonsensical and symptomatic of the bad faith that was demonstrated in the manner in which Mr. Jeffers conducted this trial. Not only were [Petitioners] trying to conduct a trial by ambush, which the Court would not permit, but the premise itself was too raw for this Court to accept. . . . (App. 31).

The court did not refuse to consider such "circumstantial evidence," and did not dismiss its potential relevance. Instead, the court declared the evidence to be "weak."

As to other "circumstantial evidence" vaguely alluded to in the Petition, generally concerning the supposedly nefarious alteration or destruction of a will by Lynch and O'Sullivan, these issues had, before the trial began, been finally resolved in Respondents' favor in the "destroyed will" action, and it would have been improper for the court to have relitigated them in the trial of the will contest.

Contrary to the implication that the finding of consistency in McHenry's estate plan was based on opinions to which O'Sullivan testified, the finding was based on detailed documentary evidence, consisting of specimens of each of McHenry's wills and codicils, and many instances of original detailed handwritten and typewritten instructions by the McHenrys for preparation of the wills.

On the matter of the advice given to the McHenrys about O'Sullivan's conflict of interest in preparation of the McHenry wills, Petitioners incorrectly characterize O'Sullivan's testimony about advice to the McHenrys to seek outside counsel. O'Sullivan testified at trial that because of the conflict of interest, he suggested that McHenry should consider retaining separate counsel, and asked McHenry several times over the years if he wanted to do so. O'Sullivan was candidly unable to recall specific details of those discussions, which occurred over a period of 35 years. Obviously, as the trial court and the Court of Appeal observed, O'Sullivan did not protect himself by

obtaining written waivers of the conflict from the McHenrys. However, as the trial court pointed out, the failure to have obtained written waivers, did not itself resolve the factual question of whether McHenry was unduly influenced to make the residuary gift. The court was quite clearly convinced of McHenry's independent thought processes by other evidence. It said:

> While not having protected himself by having written waivers in each instance by the McHenrys is hardly a recommended practice, it appears that McHenry would have wanted to have O'Sullivan prepare the Will in any case. More important, based on the McHenrys' long-standing testamentary pattern, O'Sullivan does not appear to this Court to have influenced McHenry to make a gift to him, either properly or improperly. (App. 37).

Petitioners argue that because of certain events in McHenry's life in 1984, tax issues should have been raised with McHenry in connection with his 1984 will which were not. The argument is not based on any evidence offered at the trial about the need for tax advice and is just made up. No evidence of any kind was offered concerning tax advice given (or not given) by O'Sullivan in connection with the sale of McHenry's businesses. The purported tax issues raised by the death of McHenry's first wife, Bernice, and his subsequent remarriage (which ended in divorce before the 1985 codicil republished his will) are a red-herring, indicative of the attenuated inferences Petitioners insist the trial court was required to draw. The tax issue referred to by Petitioners is the so-called "marital deduction."

If their argument is not purely disingenuous, Petitioners apparently have not yet grasped the import of the evidence. The various wills admitted to evidence showed conclusively that the marital deduction was employed to its fullest in the reciprocal estate plans McHenry executed with his first wife, Bernice. McHenry and his wife were able to be availed of full use of the tax-deferring measure, because McHenry and his first wife left their estates entirely to one another. The idea that, for tax reasons McHenry would have left his second wife a larger gift than the specific cash bequest provided for her (included in his will, and *omitted* in his codicil) is contrary to the evidence offered by Petitioners. Ironically, Petitioners themselves offered proof that McHenry intended to divorce his second wife at the time he executed his will.

Petitioners refer to their "two-fold attack" on O'Sullivan's position. The first prong of this attack, that O'Sullivan's evidence was insufficient to overcome the presumption of undue influence, was not accepted by the trial court, which considered the evidence overwhelming, or by the Court of Appeal, which found substantial evidence to support the trial court's application of the relevant standard of proof, be it clear and convincing, or higher.

The second prong of this "two-fold attack" was, and apparently is again, to present unsupported conclusions as facts (e.g., the disputed statement that "O'Sullivan acted in a way that strongly suggested he was aware that he took advantage . . . "), and to selectively reargue evidence which was found to be unconvincing by the trial court, or which was already the subject of a final judgment in the "destroyed will" action. Petitioners offer

these "facts" in an illusive manner in their Petition, omitting mention that many such "facts" were disputed by their own witnesses, or offered by witnesses whose testimony was found by the court not to have been credible.

As an example, Petitioners characterize evidence concerning McHenry's visual acuity, attempting to infer that because McHenry could not see, O'Sullivan "put things in the will". The trial court, however, received the proffered evidence about McHenry's vision; Petitioners' own expert testified not only that McHenry was not blind, but that it would have been possible for McHenry to read type smaller than was contained in his will. (App. 22). Moreover, there was nothing other than pure conjecture by Petitioners, to suggest that O'Sullivan "put" anything in the will other than as instructed by McHenry.

The discussion by Petitioners of McHenry's purported intention to make a $300,000 bequest to his chauffeur in his 1984 will is another example of Petitioners' misleading characterization of the record. The trial court, rather than ignoring this "evidence," discussed it at length in its Statement of Decision, (App. 37) pointing out, among other things, that the testimony of Petitioners' own witness, nurse Gladys DuBois, discredited the evidence.

Petitioners mention that O'Sullivan "claimed" not to have worked on McHenry's "divorce papers," omitting mention of the fact that the papers were prepared by O'Sullivan's law firm and signed by O'Sullivan.

One remarkable statement in the Petition concerns McHenry's execution of the 1985 codicil (which republished the 1984 will, subject to the amendments contained in the codicil). It is said by Petitioners that McHenry

made and executed this codicil "without O'Sullivan's assistance". The obvious, and incongruous, implication of execution of the codicil without O'Sullivan's involvement would be that McHenry republished the will, containing the residuary gifts to Lynch and O'Sullivan, in such a way that O'Sullivan was not in a position to have unduly influenced McHenry. In fact, though, the evidence clearly was that O'Sullivan did prepare the codicil on McHenry's instructions. This misinformation, and various other innuendo in the Petition appear to have been proffered in an effort to imply that O'Sullivan was not a credible witness. The trial court, however, specifically found otherwise. (App. 28).

Clearly, Petitioners have been motivated to apply a spin on the "facts" that will interest this Court. However, the content of the Petition ignores the weight of evidence in the record, and utterly fails to address the actual fact-finding and reasoning both of the trial court and the California Court of Appeal.

## REASONS FOR DENYING THE WRIT

Petitioners Hall and Mills have attempted in their submission to this Court to articulate two grounds for review. Neither of them is of merit.

The apparently more significant of the issues was not raised in the courts below by Petitioners. Petitioners assert that in order for them to have been afforded procedural due process, the California appellate courts were required to apply a stringent, unarticulated standard of review to the findings of the trial court, in order to

preserve the integrity of the California Bar. As discussed below, the integrity of the California Bar is the province of the California courts, and, in any case, no Constitutional issue is raised by the proper application of California's "substantial evidence" standard of review to the trial court's findings.

Petitioners also posit vaguely and broadly that the Constitution requires courts to allow proof, in claims against lawyers, by circumstantial evidence. Even if there were some merit to such a contention, this would clearly be a poor case in which to raise it. As even the limited record here demonstrates, rather than having prevented Petitioners from making proof of their claim by circumstantial evidence, the trial court liberally admitted circumstantial evidence, and was simply not convinced by it. Regardless, as discussed briefly below, this Court should decline the invitation to review the evidence in this case *de novo*.

## 1. THERE HAS BEEN NO DENIAL OF PROCEDURAL DUE PROCESS

Petitioners argue that the appellate court failed to apply a standard of review which would protect Petitioners' due process rights, in a case where the standard of proof at trial required O'Sullivan to prove by "clear and convincing evidence" or by "clear and satisfactory evidence" that McHenry was not unduly influenced. This hardly appears to be a matter in which there has been a denial of procedural due process to Petitioners. Instead, even from the limited record, it quite clearly is a case in which Petitioners have received a surplus of due process.

Petitioners have pursued this matter zealously, even obsessively, availing themselves of appellate review at each turn. Petitioners have been so implacable, that they have never been willing to address, much less acknowledge the overwhelming weight of evidence which supported the judgment. They have stubbornly refused to exhibit recognition of the very basic premise of trial practice that innuendo and conjecture are not good evidence.

At each stage of the judicial process, under various pretenses, Petitioners have, in effect, sought *de novo* review, as if each court had an obligation to review the record in its entirety and second-guess the trial judge, with whom Petitioners so strongly disagree. This, of course, reflects a fundamental misapprehension of the role of appellate court, which is not intended to be the trier of fact. It is not the burden, nor the proper function, of higher courts to reweigh evidence.

Perhaps because of the prevailing atmosphere of lawyer-bashing, Petitioners have presumed all along that the courts would see a lawyer receiving a gift in a will prepared by him as so intrinsically evil that the courts would repudiate the right of the lawyer to defend his conduct, and would suspend the rules of evidence to permit Petitioners to introduce any form of innuendo or speculation as their proof.

In fact, the California courts appropriately consider receipt by a lawyer/draftsman of a gift from a will as so inherently suspicious that they created a rebuttable presumption of undue influence against the lawyer-beneficiary, and require the lawyer to prove affirmatively, by clear and convincing evidence, the negative; that the

client made the gift to the lawyer of his own volition, i.e., that there was no undue influence involved. This is the difficult burden that faced O'Sullivan below. The evidence he offered to successfully satisfy the burden is discussed at significant length in the record.

Petitioners contend that the burden of proof placed on O'Sullivan calls for an augmented standard of review by the appellate court. Petitioners fail to grasp that, under the substantial evidence standard of review, which was correctly applied in this case, the appellate courts are called upon to review the evidence *as it applies to the standard of proof required at the trial level*, whether it is a "preponderance of evidence" standard of proof or the "clear and convincing evidence" standard of proof.

Petitioners' suggestion that a more stringent standard of review should apply in this case displays an obvious misunderstanding of the roles of the appellate courts and trial courts and the application of the substantial evidence test, and also ignores the fact that both the trial court and appellate court herein followed the correct standards; the trial court in fact applied even a more rigorous standard than was required under California law.

As the California Supreme Court reiterated in *Crail v. Blakely*, 8 Cal. 3d 744, 750, 505 P.2d 1027, 1031, 106 Cal. Rptr. 187, 192 (1973):

> "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review

> on appeal." (Nat. Auto. & Cas. Co. v. Inc. Acc. Com., 34 Cal. 2d 20, 25, 206 P.2d 841, 843 (citations omitted)).

8 Cal. 3d 744 at 750.

In *Crail*, the court was faced with an appeal from an action to enforce an oral agreement between plaintiffs' deceased parents regarding the disposition of their estate. Recognizing that the court was required to and did apply a "clear and convincing" standard in weighing the plaintiffs' testimony, the court said that:

> That standard was adopted, however, for the edification and guidance of the trial court, and was not intended as a standard for appellate review.

*Id.*

The application of the substantial evidence review in a case requiring a stringent burden of proof at trial was explained in the recently decided case of *Hoch v. Allied-Signal, Inc./Bendix Safety Restraints Division*, 24 Cal. App. 4th 48, 29 Cal. Rptr. 2d 615 (1994). In *Hoch*, a special administrator for a decedent sought punitive damages in a survival action arising from the car accident that killed the decedent. The trial court granted nonsuit on the issue of punitive damages, finding insufficient evidence that Allied-Signal had consciously disregarded decedent's rights.

The appellate court employed a substantial evidence test in determining whether the nonsuit could be supported. 24 Cal. App. 4th at 58. Allied-Signal contended, as do Petitioners here, that since the plaintiff's burden at trial on the punitive damages claim was to establish

oppression, fraud or malice by clear and convincing evidence, this more rigorous evidentiary standard should also apply on review of a nonsuit granted. The appellate court disagreed, citing to *Crail, supra,* but noted that the appellate courts must keep in mind the higher standard of proof in viewing the evidence. *Id.*

The *Hoch* court of appeal analogized to the proof required in criminal cases, ironically citing *Jackson v. Virginia,* 443 U.S. 307 (1979), which is cited by Petitioners herein. In a criminal case, the evidence is sufficient to support a conviction if a reasonable trier of fact could have found that the burden of proof of "beyond a reasonable doubt" was sustained by the prosecution. The *Hoch* court explained:

> The evidence need not convince the reviewing court beyond a reasonable doubt, but must be substantial enough for a reasonable trier of fact to have convicted on that standard. [citation omitted]. . . . Analogously, a motion for nonsuit in a case requiring clear and convincing evidence should be granted only if the trial court determines no reasonable jury could find the plaintiff has presented clear and convincing evidence on the disputed issue.

24 Cal. App. 4th at 60.

There are many other examples of the application of the substantial evidence standard of review by California appellate courts in cases in which the litigants were circumscribed at the trial level by the stringent "clear and convincing" burden of proof. See, e.g., *In re Phillip B.,* 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979) (substantial evidence standard of review applied in case where clear

and convincing burden of proof was required by the due process Clause of the Fourteenth Amendment in juvenile dependency proceeding); *Cochran v. Board of Supervisors of Del Norte County*, 85 Cal. App. 3d 75, 149 Cal. Rptr. 304 (1978) (whereas burden of proving a parol partnership is by clear and convincing evidence, appellate review is limited to determination of whether substantial evidence supports trial court or agency's conclusions).

In the case at bar, the trial court made clear that the standard under which O'Sullivan was required to rebut the presumption of undue influence was either "clear and satisfactory" or "clear and convincing." The court found that, in any event, O'Sullivan had offered evidence which rebutted the presumption not only meeting those burdens of proof, but in fact had met the inapplicable higher standard of "beyond a reasonable doubt."

In reviewing the trial court's decision, the California Court of Appeal was cognizant that the substantial evidence test was being applied to a stringent standard of proof at trial. The court specifically found there to have been substantial evidence to have supported the trial court's finding that O'Sullivan sustained his burden of proving, by clear and convincing evidence, that there had been no undue influence in the rendering of the residuary clause. (Pet. App. 20a).

Petitioners' contention that their due process rights were violated is to no avail, inasmuch as the California Court of Appeal determined that there was substantial evidence to uphold a judgment based on O'Sullivan's proof beyond a reasonable doubt that McHenry was not

unduly influenced. As the California Court of Appeal has remarked:

> With rhythmic regularity it is necessary for us to say that where findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. Nobody seems to listen.

*Overton v. Vita-Food Corporation*, 94 Cal. App. 2d 367, 370, 210 P.2d 757, 759 (1949).

Petitioners cite to only two cases, both inapposite, to support their urging for some augmented standard of review on appeal. In *Honda Motor Co., Ltd. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331 (1994), the Court held that the State of Oregon's Constitution denied due process by *prohibiting* judicial review of the size of punitive damages awards. The Court specifically did not reach the issue of what standard of review is constitutionally required in punitive damage cases. 114 S.Ct at 2341 n.10. *Honda* is not on point.

In the other case cited by Petitioners, *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court discussed the standard of review for habeas corpus relief, also not relevant or analogous to the situation at bar.

Petitioners' position is, in essence, that when a lawyer is a party to a proceeding in a will contest case, the

United States Constitution requires that the appellate court must employ a standard of review higher than that utilized in other civil matters. The only articulated reason Petitioners offer for their argument that the Due Process Clause of the Fourteenth Amendment requires some higher appellate standard of review in cases such as this is "to protect the integrity of the bar." However, it is the duty of the separate state and federal judicial systems to control the conduct of their own officers, among whom lawyers are included. *Theard v. United States*, 354 U.S. 278, 281 (1957). This Court is hardly bound by virtue of the Fourteenth Amendment to protect the honor of any bar, or in particular the State Bar of California which is regulated by the Supreme Court of California. *Ramirez v. State Bar of California*, 28 Cal. 3d 402, 411, 169 Cal. Rptr. 206, 211, 619 P.2d 399, 404 (1980).

Further, California courts have long recognized that there is no basis for subjecting judgments in will contest cases to a higher standard of scrutiny on appeal. "The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case." *Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689, 690 (1943) (applying substantial evidence standard of review). "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of the appellate court *begins* and *ends* with the determination of whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." *Foreman & Clark Corp. v. Fallon*, 3 Cal. 3d 875, 881, 92 Cal. Rptr. 162, 165-66, 479 P.2d 362, 365 (1971).

Petitioners provide no compelling case on Fourteenth Amendment grounds for requiring a more stringent standard of appellate review than that which California courts have traditionally employed. "If a thing has been practised for two hundered years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991). Notwithstanding Petitioners' urging, the Due Process Clause does not warrant suddenly overturning California's appellate standard of review for this or any similar action.

## 2. PETITIONERS' DUE PROCESS RIGHTS WERE NOT ABRIDGED BY ANY REFUSAL OF THE LOWER COURTS TO CONSIDER CIRCUMSTANTIAL EVIDENCE

As mentioned above, it is apparent that the trial court gave Petitioners broad latitude in the admissibility of "circumstantial evidence". To whatever extent the trial court deemed irrelevant certain circumstantial evidence, it is unapparent from the Petition that the court abused its discretion in so doing. On the other hand, it is apparent from the materials appended to the Petition and this Opposition Brief that the court's consideration of circumstantial evidence, and reluctance to consider certain of it, was given due attention. It is not a violation of a party's right to procedural Due Process for a court to refuse to admit evidence which is irrelevant, or which is excluded based on other widely recognized evidentiary policies.

Many of the evidentiary rulings of the trial court were the subject of Petitioners' appeals and were considered by the Court of Appeal under the appropriate abuse

of discretion standard established under California law. E.g., *Decter v. Stevenson Properties*, 39 Cal. 2d 407, 420, 247 P.2d 11, 18 (1952). If Petitioners mean to suggest that this Court should enunciate a different standard of review for discretionary rulings, it is not discernable from the Petition.

## CONCLUSION

Petitioners raise no question, based on the conduct of the proceedings below, of denial of their right to procedural due process. Nor do Petitioners provide a compelling reason for this Court to create a heightened standard of review for matters involving the conduct of attorneys. Such issues are properly addressed by the courts of the respective states, not by this Court. Here, for apparently good reasons, the Supreme Court of California would not disturb the judgment. Likewise, the Petition for Writ of Certiorari should be denied.

Dated: December 27, 1994

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NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

| | |
|---|---|
| Estate of SHELTON A. McHENRY, Deceased. | |
| BEATRICE CUNNINGHAM MOORMAN et al., Petitioners and Appellants. v. THOMAS E. O'Sullivan et al., Objectors and Respondents. | No. B 067397 (Super.Ct.No. P 718563 (Filed Dec. 3, 1993) |

Beatrice Cunningham Moorman, and others, appellants herein, appeal the granting of summary judgment against them denying their petition to probate a destroyed will.

The decedent, Shelton McHenry, died on July 14, 1987, leaving a considerable estate. His will, executed in May 1984 and a 1985 codicil thereto, were admitted to probate on August 24, 1987. Under the 1984 will, specific cash bequests were made to a number of friends, employees and relatives, ranging in amounts from $5,000

to $50,000.[1] The residue of the decedent's estate was left to the respondents herein, the decedent's attorney, Thomas E. O'Sullivan, and the decedent's former business manager, John T. Lynch.

The decedent was survived by a number of relatives, the closest of whom were first cousins. Several of the cousins thereafter filed various will contests to displace the probated will. Those efforts have thus far been unsuccessful.[2]

The proceedings which resulted in the judgment in issue here began on November 21, 1990, when Moorman filed a verified "Petition for Probate of Destroyed Will and for Letters of Administration with Will Annexed."[3] In the petition Moorman requested that "decedent's destroyed will" be admitted to probate. The petition alleged that the destroyed will was dated sometime after April 20, 1985. (April 20, 1985, was the date of execution by decedent of the codicil to the will.) As to the substance

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[1] The 1985 codicil merely deleted specific cash bequests to the decedent's deceased mother and his seond wife.

[2] These proceedings have been the subject of numerous previous appeals in this court, some of which are still pending. Trial on the contest of the probated 1984 will and 1985 codicil was pending as of the date of the judgment in this case. Our decision in this case does not, of course, affect the other matters that are still pending.

[3] Initially, Moorman was named as the sole petitioner. However, in later filed papers, the other appellants, Edward Hall, David McDaniel, Dennis McDaniel, Jerry McDaniel, Roy Dyas, William Mills, Debra McDaniel, Myrtle Martin and Francis O'Highley, were also named as proponents of the destroyed will. All proponents were and are presently represented by the same attorney.

of the destroyed will, Moorman alleged it contained 17 specific bequests to non-relatives and a bequest to Terry Gillard, in an amount "to be determined by competent witnesses." As for the residue, the petition alleged, "The balance of the estate to go to decedent's *'Handful of relatives'* who are cousins of the decedent and only heirs" and listed their names.[4]

Respondents filed contests to the petition for probate of the destroyed will, challenging that the purported will ever existed. The matter then became at issue with trial scheduled to commence on December 23, 1991.

On November 14, 1991, O'Sullivan moved for summary judgment on appellants' petition.[5] Lynch joined in the motion and hearing on the motion was set for December 17, 1991. On November 26, 1991, while respondents' summary judgment motion was pending, Moorman filed a document entitled "Supplement to Petition for Probate of Destroyed Will and for Letters of Administration with the Will Annexed." In this verified document, Moorman changed her earlier position that the "[D]estroyed will had been dated after April 20, 1985," stating that the probated will was in fact the decedent's "true will," and that all but the signature pages of the probated will had been destroyed and that pages in the will had either been substituted or altered in some fashion. She further swore that on the date of the decedent's death, the respondents

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[4] The appellants are either listed in the petition as a part of the "handful of relatives" or are heirs of those listed.

[5] On October 25, 1991, appellants filed their own summary judgment motion. Their motion was denied on November 22, 1991.

went into the decedent's safe and removed the true will and substituted or altered some pages "to accomplish what they wanted to accomplish, to gain the estate for their personal benefit and gain."

Respondents submitted the following evidence in support of their summary judgment motions. O'Sullivan had been the decedent's business and personal attorney for over 30 years. He prepared numerous wills for both decedent and his first wife, Bernice. Between 1960 and 1985, the decedent executed a series of nine wills and three codicils. Sometimes the McHenrys kept their original wills themselves and sometimes they had O'Sullivan keep their originals [sic] wills for safekeeping. He kept for safekeeping the decedent's original will of May 23, 1984 and the original codicil of April 20, 1985, the documents that were admitted to probate.

Beginning with the 1965 will, O'Sullivan was designated to receive five percent of the estate residue. He was to receive the same under the 1967 will. Then, beginning with the will of June 30, 1969, O'Sullivan's percentage share began to increase. He was to receive 14 percent under the 1969 will, 16.5 percent under the 1971 will, 15 percent under the 1972, 1975 and 1976 wills and 50 percent under the 1981 and 1984 wills.

Lynch also was named as a residual beneficiary. He was to receive 35 percent under the 1972 codicil. His share was increased to 55 percent in both the codicil of 1975 and the will of 1976. The amount was later reduced to 50 percent under the wills of 1981 and 1984.

The last testamentary document prepared for the decedent was his 1985 codicil. O'Sullivan knew of no other person who prepared any will for the decedent.

The decedent had no brothers or sisters and his parents and his wife, Bernice, predeceased him. He had first and second cousins with whom he was not particularly close. While the decedent left specific cash bequests to certain relatives and friends, since 1960 the decedent left the residue of his estate to those employees who helped him earn it.

After learning of the decedent's death on the morning of July 14, 1987, O'Sullivan went to the decedent's apartment residence. He was concerned about an expensive watch that the decedent owned. Lynch arrived about the same time. Upon entering the apartment, O'Sullivan asked Terry Gillard, the decedent's personal attendant and chauffeur, where the watch was kept. Gillard indicated the watch was in the decedent's personal safe and he attempted to open the safe for O'Sullivan. When Gillard had some difficulty opening the safe, he gave the combination to O'Sullivan, who was able to open it. Upon opening the safe, O'Sullivan looked through its contents and found the watch he was looking for. He removed the watch and placed it in a safe deposit box. At no time did O'Sullivan see or remove any will from the safe nor did he destroy any will of the decedent.

In opposition to summary judgment and to support their contention that the decedent's "true will" was destroyed, appellants mainly relied on evidence from Terry Gillard and appellant Moorman. Gillard presented

evidence by declaration and by deposition. In his declaration, Gillard stated that on the day of decedent's death, O'Sullivan and Lynch went to decedent's safe. There were several envelopes in the safe. One of the envelopes was labelled "IMPORTANT DOCUMENTS" and another was labelled "WILL." O'Sullivan took the papers out of the safe and said, "This is it." O'Sullivan and Lynch then both left the apartment with the papers.

Gillard's deposition was later taken. According to that testimony, the decedent, at one time, had asked Gillard to inventory the watches, rings, cuff links and other jewelry in his safe. While doing so, Gillard saw some papers which he moved around but did not open or read. He did observe writing on the outside of some envelopes. He identified Lynch's handwriting on some and O'Sullivan's on others. The envelopes were sealed and some had dates written on them. He recalled 1981, 1984 and 1985. Another envelope, yellow in color, was labelled "IMPORTANT DOCUMENTS." Another envelope was labelled "WILL." Apparently the years 1981 and 1984 were also written on that envelope. It was approximately 8½ by 11 inches and was the only document labelled "WILL" in the safe. On the morning of decedent's death O'Sullivan removed only one envelope from the safe. It was approximately 8½ by 11 inches in size, appeared yellow in color and looked like the "faded one" with the years 1981 and 1984 on it.

The evidence from appellant Moorman was also by declaration and deposition. In her declaration, Moorman stated that she and the decedent were cousins. She frequently visited with the decedent, and she was very close to both the decedent and his first wife, Bernice. Decedent

spoke with Moorman on several occasions about "How his estate would go." He indicated that both Terry Gillard and Moorman's mother would always be taken care of, and that the rest would go to the "handful of relatives." That handful of relatives would have been Harold McDaniel, Archibald McDaniel, Claude Cunningham, Myrtle Martin, Francis O'Highley, Edward S. Hall, William Dean Mills and Roy E. Dyas.

At her deposition, however, Moorman admitted that she did not know if the decedent had ever created a will. She also admitted that the decedent never told her that he was going to leave a specific amount of money to any specific person nor did he ever tell her who the "handful of relatives" actually included and nor was she told any specific amount that those relatives were to receive. She had no idea whether those relatives were to take in equal shares or in different amounts. She had never seen the will that was purportedly destroyed nor did she know that it was actually destroyed. She could not testify as to any single provision of the will.

The summary judgment motion was heard on December 17, 1991. The trial court granted respondents judgment on the will contest and denied the petition for probate of the "lost or destroyed will." Judgment was entered on March 19, 1992. Appellants then filed their appeal.

A will may be admitted to probate even though the original document has been lost or destroyed. (Prob. Code, § 8000. subd. (b).) The procedures are governed by statute. (*Ahlborn v. Peters* (1940) 37 Cal.App.2d 698, 702.) Formerly, under Probate Code section 350, to probate a

lost or destroyed will, the provisions of the will had to be "clearly and distinctly proved by at least two credible witnesses." (*Estate of Thompson* (1941) 44 Cal.App.2d 774, 776.) In 1982, the California Law Revision Commission issued a recommendation that the requirements of Probate Code section 350 be relaxed. The commission stated that "The rule that denies probate to a missing will under these circumstances – in cases where there is no reasonable doubt that there was such a will and that it was valid and unrevoked at the testator's death – is a substantial defect in California Law." (16 Cal. Law Revision Com. Rep. (Dec. 1982) p. 2327.)

As a result of the commission's recommendation, Probate Code section 8223 was enacted, which provides as follows: "The petition for probate of a lost or destroyed will shall include a written statement of the testamentary words or their substance. If the will is proved, the provisions of the will shall be set forth in the order admitting the will to probate."

Appellants contends [sic] that "Probate Code section 8223 is more liberal in construction than prior Probate Code section 350" and therefore summary judgment was improperly granted. We do not agree. Probate Code section 8223 has not "liberalized" prior law to the extent that it eliminates the requirement that the contents of the will be proved. It changes the manner in which the contents may be proved. As the commission stated, "The proposed law repeals California's extraordinary proof and two-witness requirements for proof of the terms of a missing will. It adopts the rule that proof is by a preponderance of the evidence and requires no minimum number of witnesses. This will avoid the situation where the terms

of a valid and unrevoked will *are known* but nonetheless not provable." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2328, emphasis added.) The provisions of a destroyed will must still be establised [sic] before it may be admitted to probate.

"The party opposing the summary judgment cannot rely on its pleadings, but must make an independent showing by a proper declaration or by reference to a deposition or another discovery product that there is sufficient proof of the matters alleged to raise a triable question of fact if the moving party's evidence, standing alone, is sufficient to entitle the party to judgment. [Citations.] Moreover, the opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation. [Citations.]" (*Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729, 733.)

In ruling on the motion, the court commented to appellants' counsel that although he was given half a dozen opportunities to indicate to the court the name of a single person who has seen a document he wants admitted as a lost or destroyed will, he was unable to do so. We agree with the trial court's assessment. Respondents presented evidence that the 1984 will and the 1985 codicil were the last testamentary documents executed by the defendant and that no purported "true will" was ever destroyed. In opposition, appellants have not presented any evidence as to the existence or destruction of decedent's "true will," much less what that purported will provided. Gillard did not know what envelope O'Sullivan took from the safe or what it contained. According to appellant Moorman, the residue of decedent's estate was

to be shared by a "handful of relatives." Yet Moorman admitted in deposition that she had never seen a will of the decedent before his death. She also admitted that the decedent never actually identified the "handful of relatives" who were to take under the purported will, nor did he indicate what amounts these relatives were to receive, or whether their shares were to be equal or in different proportions. We hold appellants' opposition to be based on conjecture and speculation and insufficient to raise a triable issue of fact as to the existence, destruction and contents of the purported will. As noted by the trial court: "Mr. Jeffers [appellants' counsel], you've got the purported lost and destroyed will which you tell me only one person in the world has ever seen is Mr. O'Sullivan. He denies it exists. [¶] How can you ever possibly prove something that doesn't exist?"

Appellants also contend that further discovery would have brought more witnesses to substantiate the provisions of the destroyed will. This contention is unavailing. The probate of the decedent's estate had been pending since 1987. As to the petition here involved, appellants filed an at-issue memorandum on July 29, 1991 and had served notice of the December 23, 1991 trial date on or about August 28, 1991. Appellants then brought their own motion for summary judgment on October 25, 1991. It thus appears that appellants had ample time to complete their discovery. Even if they had asked for additional time for further discovery (Code Civ. Proc., § 437c, subd. (h)), which they did not, the trial court would have acted well within its discretion by denying that request.

Finally, appellants contend that the trial court failed to specify the reasons for its determination that there was

no triable issue of material fact as required by Code of Civil Procedure section 437c, subdivision (g). This contention is also meritless. Subdivision (g) expressly authorizes an oral statement on the record in open court. That was done at the hearing in this case. In essence the court advised appellants that they were unable to present to the court or advise the court of anyone who says there was a document that they wanted admitted as a lost or destroyed will and thus they were unable to sufficiently prove the contents of such a will. Moreover, even if the court's comments were an insufficient statement of reasons, such defect would not automatically result in reversal. "We need only determine whether the record establishes the [moving parties'] entitlement to summary judgment in their favor." (*Ruoff v. Harbor Creek Community Assn.* (1992) 10 Cal.App.4th 1624, 1627.) Thus, any insufficiency in the court's statement of reasons would be harmless and of no consequence.

Respondents have requested that we consider imposing sanctions against appellants for bringing a frivolous appeal. We believe such request should be denied.

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT FOR PUBLICATION.

/s/ Fukuto , J.
FUKUTO

We concur:

/s/ Boren , P.J.
BOREN

/s/ Gates , J.
GATES

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| Estate of<br>SHELTON A. McHENRY,<br>Deceased. | Case No. P718653<br>(Consolidated with<br>Case No. EP000381) |
| EDWARD S. HALL and<br>WILLIAM DEAN MILLS,<br>Contestants,<br>v.<br>THOMAS E. O'SULLIVAN,<br>JOHN T. LYNCH, et al.,<br>Respondents. | STATEMENT OF DECISION<br>(Filed Feb. 14, 1993) |

A. Nature of Proceedings

This matter was tried to the Court, without jury, on five days, November 23 and 24, 1992, and on December 7, 8 and 23, 1992, in Department 11 of the above-entitled court, before the Honorable Edward M. Ross, Judge. The Court heard the testimony of sworn witnesses, received evidence and considered argument offered by each of the parties. At the conclusion of evidence offered by Contestants, the Court announced its tentative decision on the record. Upon request of Contestant Edward S. Hall, the Court renders this Statement of Decision in accordance with California Code of Civil Procedure, Section 632 and California Rules of Court, Rules 232 and 520.

B. Appearances of Counsel

Thomas J. Jeffers, Jr., Esq. appeared at the trial on behalf of Contestant William Dean Mills. Bruce S. Ross, Esq. and Terrence D. Franklin, Esq. of Ross & Sacks appeared on behalf of Contestant Edward S. Hall ("Hall"). Marshall W. Vorkink, Esq. and Michael Bergfeld, Esq. of Cummins & White appeared on behalf of Respondent John T. Lynch ("Lynch"). Frank D. Hobbs, Esq. and Janine N. Roper, Esq. of Rutter, O'Sullivan, Greene & Hobbs Incorporated appeared on behalf of Respondent Thomas E. O'Sullivan ("O'Sullivan").

C. Requested Statement of Decision

The Court has been requested to render a Statement of Decision including, among other matters, its findings and conclusions on the following issues, as requested by Hall:

1. Whether the Will of Shelton A. McHenry, dated May 23, 1984 (the "Will") was procured by fraud and/or undue influence. The Court will discuss this matter only insofar as it relates to issue number 2. The Court has continually pointed out that the Will of Shelton A. McHenry has been admitted to probate; the time for filing a contest expired. No contest was filed within 120 days and as the Court of Appeals has affirmed, this is jurisdictional. The residuary clause is in issue because of the status of the drafter being that of an attorney and a beneficiary. However, this Court has consistently refused to be drawn into the non-issue of the validity of the will itself. This has been deemed to be valid by order of the Superior Court and the Court of Appeals. This case was

sent back by the Court of Appeals to decide the validity or lack thereof of the residuary clause only.

2. Whether the residuary clause in the Will was procured by fraud and/or undue influence.

3. Whether O'Sullivan adequately rebutted the presumption of undue influence and/or fraud by clear and satisfactory evidence that:

> a. The "transaction" between O'Sullivan was fair and equitable. (The Court does not really understand exactly what the Contestant means by this. If "transaction" refers to some sort of contractual transaction it is irrelevant. If it refers to the issue of fraud or mistake or undue influence on the part of O'Sullivan it will be discussed in that context.
>
> b. O'Sullivan had taken no advantage of the attorney-client relationship between himself and McHenry.
>
> c. O'Sullivan "fully informed McHenry" as to "all matters relative to the execution of the Will".

4. Whether O'Sullivan and Lynch engaged in a conspiracy to procure the Will and/or the residuary clause contained in the Will through fraud and/or undue influence.

Again, the Court will discuss this thoroughly in reference to the residuary clause. The will itself, *in toto* is a non-issue except as to the residuary clause.

5. Whether O'Sullivan's conduct in preparing the Will or the residuary clause affected the validity of the bequest to Lynch.

6. Whether a presumption of undue influence or fraud was raised by the conduct of Lynch relative to the preparation of the Will and/or the residuary clause.

7. If a presumption of fraud or undue influence was raised by the conduct of Lynch, whether Lynch successfully rebutted that presumption.

In addition to the foregoing, the Court has been requested by Respondents, to supplement its Statement of Decision by addressing the following issues in its Statement of Decision, to the extent they are not addressed in response to Contestants' requests:

1. Whether there was fraud or undue influence exercised by O'Sullivan in connection with the Will.

2. Whether there was fraud or undue influence exercised by Lynch in connection with the Will.

3. Whether there was fraud or undue influence exercised by O'Sullivan in the making of the Codicil to the Will, which Codicil was dated April 20, 1985 ("Codicil").

4. Whether there was fraud or undue influence exercised by Lynch in the making of the Codicil.

5. Whether there was mistake on the part of McHenry in connection with the making of the Will.

6. Whether there was mistake on the part of McHenry in connection with the making of the Codicil.

7. Whether the Codicil republished the Will, so as to cure any defect in execution of the Will.

D. Statement of Decision

1. Factual Findings

O'Sullivan is an attorney, admitted to practice in 1955, and a Certified Public Accountant. He has not been the subject of disciplinary investigation or proceedings by the State Bar of California or by the California Board of Accountancy. O'Sullivan is co-executor and co-residuary legatee in the Estate of Shelton A. McHenry ("McHenry").

Lynch is a co-residury legatee of McHenry's estate, and a former general manager of McHenry's restaurant business.

Contestant Hall is a cousin of McHenry who was the beneficiary of a specific bequest of $5,000.00 in the Will. Until preparation of the Will, Hall had not been named as a beneficiary in any of McHenry's 12 wills and codicils since 1960.

Contestant Mills is a first cousin, once removed, of McHenry. Mills was not named in any of McHenry's wills and codicils from 1960 to 1987.

McHenry came to California in or about 1930. McHenry and his wife, Bernice, were married in 1932. They never had children. At the time of McHenry's death on July 14, 1987, his closest living relatives were cousins (Bernice had predeceased him in 1983), and there were no natural objects of McHenry's bounty.

A few years after coming to California, McHenry became employed as maitre d' of the Somerset House, a then famous restaurant owned by attorney Todd Johnson ("Johnson"). In 1938, with the financial assistance of Johnson and a few others, McHenry opened his own restaurant, The Tail O' the Cock. Johnson became McHenry's lawyer and business and tax advisor.

In 1955, O'Sullivan was hired by Johnson as an attorney. It was in that connection, and shortly thereafter, that O'Sullivan first met McHenry. O'Sullivan began doing McHenry's legal and tax work almost immediately after becoming employed by Johnson. Through the years O'Sullivan became generally involved in McHenry's tax, business and legal matters. O'Sullivan was the personal attorney and business attorney for Shelton A. McHenry for a period in excess of 30 years prior to McHenry's death.

In 1956 O'Sullivan became Johnson's partner in a law firm known as Johnson, Robertson, Sullivan & O'Sullivan. In his practice at that firm, O'Sullivan devoted a substantial amount of his time to the McHenrys' business. From about 1955 until McHenry's death, O'Sullivan did virtually all, if not all, of the McHenrys' legal work. No task of a legal nature was too big or too small for O'Sullivan to do. He represented the McHenrys in substantial real estate transactions; likewise, he performed more modest tasks, such as representing McHenry before the Labor Commission in an employment matter, and in making inquiries of the jury commissioner on behalf of McHenry's employees.

Among the work performed by O'Sullivan for the McHenrys was their estate planning. In 1960, about five years after O'Sullivan began doing legal work for the McHenrys, the McHenrys first asked that O'Sullivan prepare wills for them. The McHenrys' 1960 wills were the first of eleven wills or codicils prepared by O'Sullivan for McHenry between 1960 and 1981. After Bernice died in 1983, O'Sullivan prepared the Will and Codicil for McHenry. An exemplar of each of those instruments was received in evidence.

The McHenrys altered the disposition of their estate with some frequency, and were extremely detailed in their approach. Though they often altered the specifics of the disposition of their property, their general testamentary plan was consistent, and remained the same over the years with only minor variations.

While the McHenrys were both living, their wills were always reciprocal. Their dispositive plan generally involved giving the bulk of their wealth to employees and social friends, leaving specific cash bequests to particular relatives. In each case, the residue of their estate, including their restaurant business, was divided among their key employees and professionals.

From 1960 to 1985 each will and codicil made by them followed that pattern. The McHenrys were private about their legal affairs, and wanted their legal work done only by O'Sullivan. O'Sullivan honored their wishes with circumspection about their estate plan.

The 1960 wills prepared by O'Sullivan named Johnson as one of several contingent co-residuary legatees of

the estate (in the event of the death of both of the McHenrys, Johnson was to receive 10% of the residue of the estate). O'Sullivan made an effort to learn whether a lawyer outside Johnson's firm should prepare the will. Johnson informed O'Sullivan that he had previously raised the issue with McHenry. McHenry did not want any other outside lawyer or law firm doing his legal work, particularly his will, which was considered to be quite personal.

O'Sullivan had conversations to the same effect with McHenry and with Bernice in which they discussed the issue of conflicts of interest. Though O'Sullivan could not specifically recall such a discussion in connection with the 1960 wills (in which O'Sullivan was not a beneficiary), he recalled that such discussions with the McHenrys did occur in connection with their later wills. The McHenrys expressed very strong opinions as to how their estate was to be divided and as to who they wanted to prepare their wills. After a number of years of preparing different iterations of the McHenrys' wills, and the McHenrys' consistent expression of the pattern of distribution of their estate, O'Sullivan no longer addressed with Mr. and/or Mrs. McHenry the issue of conflict of interest.

There was considerable evidence at the trial of detailed instructions given to O'Sullivan as, over the years, the McHenrys' [sic] requested that he prepare their wills and codicils. As numerous exhibits showed, it was usual for the McHenrys to give detailed O'Sullivan directions for the disposal of money or particular items of personal property. The instructions were typically typed

on the McHenrys' letterhead, or were in their handwriting, either in the form of a letter or by interlineation on a copy of a prior will. In each of the McHenrys' wills, the total of specific cash bequests to persons other than family members exceeded the total left to family members. In each will, gifts of personal property were made only to persons to whom the McHenrys were not related. In each will, the residue was left to employees.

The pattern of distribution of the McHenrys' estate over the years is summarized in Exhibit 65 which was received in evidence. It shows the consistency of the McHenrys' provision of relatively modest cash bequests for relatives over the years. The summaries illustrate the McHenrys' practice of leaving the residue of their estate, including their business interests, to their key employees and their professionals.[1] They also illustrate that the residuary gifts would be altered, from time to time, as individuals would come into their employment, leave their employment, or die.

O'Sullivan first became a contingent residuary legatee of the McHenry estate in the McHenrys' 1962 wills. In those wills he was named as a contingent beneficiary of Todd Johnson's contingent gift. In later wills prepared prior to 1981, O'Sullivan was designated to receive from five percent to 16.5 percent of the residue; in the 1981 wills, the bequest was increased to 50 percent.

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[1] The exceptions to this practice involved only McHenry's mother (who was last left a residuary bequest in 1969) and Mrs. Austin Martin (who was left a gift of shares in a public company in the McHenrys' 1965, 1967 and 1969 wills).

Lynch, who began his employment with the McHenrys' restaurant business in 1971, was first named as a residuary legatee of 35 percent in the McHenrys' 1972 codicils to their 1971 wills, and also in their 1975 codicil (55 percent), 1976 will (55 percent) and 1981 will (50 percent). O'Sullivan never discussed the amount or nature of any gift to any person with the McHenrys, and never made any effort to influence them in their disposition of property. He never discussed the McHenry estate with Lynch, or any person other that [sic] the McHenrys. Lynch was not aware that he was a beneficiary of the McHenry estate before McHenry's death in 1987.

In 1975, the McHenrys executed a testamentary trust. The property in the trust was, according to the trust provisions, to pass according to the provisions of the McHenrys' wills.

In 1981, at the McHenrys' instruction, O'Sullivan prepared wills for the McHenrys, no less than the tenth testamentary instrument prepared by O'Sullivan for each of them. The will, as all of those that preceded it, was generally consistent with the previous iterations of the McHenrys' disposition of their property. For the first time, there were only two residuary beneficiaries named in the will; Lynch and O'Sullivan. The testimony showed beyond a doubt that there was no fraud, duress or undue influence exercised by O'Sullivan or Lynch in connection with the making of this will.

In March, 1984, after Bernice's death, McHenry suffered a stroke, and was hospitalized. Though he was effected physically by the event and appeared at times

after it to be depressed, according to his treating physician, Dr. Blake, McHenry remained mentally alert after leaving the hospital in early December, 1984. Dr. Blake described McHenry as a distinguished, eloquent individual.

McHenry also suffered for several years from loss of sight attributable to macular degeneration. It is unclear how well McHenry could see to read. Evidence was adduced from Contestants' own witness, Dr. Asano, that, in May, 1984, with vision aids, McHenry could read type smaller than that on this page. Though it was clear from the evidence that McHenry's ability to read was quite limited, it appeared that he was not legally blind.

A short period of time before McHenry signed the Will in May 1984, he instructed O'Sullivan to prepare it, and gave O'Sullivan specific instructions as to its content. The Will differed from McHenry's 1981 will in that it no longer contemplated that Bernice would receive any portion of his estate, as she was then deceased. It increased a gift of monthly income to his mother, and adjusted a cash bequest he made to her. It added a specific bequest of $500,000 for his new wife, Ruth Tullis. It also included gifts of cash for Terry Gillard, for Contestant Hall (who was mentioned for the first time) and Francis Highley (McHenry's cousin, also mentioned for the first time). The new will also adjusted particulars of the residuary bequest, and eliminated specific bequests of personal property to friends.

The provisions of the Will affecting disposition of property were read to McHenry by O'Sullivan, and McHenry looked at portions of the Will before executing

it. The Will was properly executed on May 23, 1984 at McHenry's residence in the presence of two witnesses, Julie Holtz and Robert Freeman, both then (but now former) employees of O'Sullivan's law firm. Testimony was offered that there was neither fraud nor influence, undue or otherwise, exercised on McHenry in connection with the Will. The Will was of a pattern consistent with the estate plan McHenry had fashioned with his deceased wife Bernice since 1960.

Though there was controverted evidence offered to attempt to prove that Lynch was present when the Will was signed, there was no evidence which connected Lynch's presence and the actual signing of the Will, or which showed any act resembling fraud or undue influence by Lynch. Circumstantial evidence offered to prove that Lynch was present when the Will was signed was not consistent, probative or believable.

On April 20, 1985, after the death of McHenry's mother and McHenry's divorce from his second wife, O'Sullivan was asked to prepare, and McHenry executed, the 1985 Codicil. The Codicil was prepared in accordance with McHenry's instructions to O'Sullivan, and it was witnessed and attested by two witnesses unrelated in any way to O'Sullivan. Testimony was offered by O'Sullivan that there was neither fraud nor influence, undue or otherwise, exercised on McHenry in connection with the Will, and there was no evidence whatsoever of any impropriety in connection with the Codicil. The testimony of one of the attesting witnesses, Mr. Rossi, indicated the lack of unusual circumstances surrounding execution of the Codicil.

The last testamentary document prepared for and signed by McHenry was the 1985 Codicil.

There was evidence proffered by Contestants to the effect that McHenry had intended to leave a substantial monetary gift to his personal assistant, Terry Gillard. This was the primary evidence offered by Contestants that McHenry's testamentary intent differed from the content of the Will. Among the ironies in the evidence offered by Contestants is that Gillard would not have benefitted had Contestants prevailed in a contest to the 1984 Will. Dr. Clifton King, McHenry's clergyman, testified that, at one point, McHenry mentioned that he intended to give Gillard $300,000. Dr. King, however, was unclear whether the gift was intended to be testamentary. Dr. King also testified that McHenry said he intended to make substantial provision for Lynch, confirming McHenry's inclination to benefit Lynch, notwithstanding McHenry's concern about losses incurred in the restaurant operations managed by Lynch.

The Court understands McHenry's statements to Dr. King about a proposed gift to Gillard, considering the circumstances under which they were made, to have been braggadocio, and the Court does not believe that he really intended to do what he bragged about doing.

The Will and Codicil were admitted to probate by this court on August 24, 1987, and no timely contest to the Will or Codicil was filed.

2. Discussion

a. Presumption of fraud and/or undue influence by O'Sullivan.

As Contestants have asserted in these proceedings, as the Court of Appeals has stated in its Opinion, and as this Court strongly agrees, the facts that O'Sullivan was the McHenrys' attorney and preparer of the Will and Codicil, and was also a beneficiary of the Will and Codicil, create a presumption that there was fraud and/or undue influence in connection with any gift to O'Sullivan under the Will. In light of that presumption, despite the claim by O'Sullivan of untimely filing of the contest by Contestants, the Court considers that it has an obligation to look into the circumstances under which the gift was made *sua sponte*. In the trial of this action, the presumption of fraud and/or undue influence by O'Sullivan was treated as one affecting both his burden of proof and the burden of going forward with evidence. The Court also examined, *sua sponte*, whether there was any appearance that the gift by McHenry to O'Sullivan was the result of mistake on McHenry's part.

In exercising its obligation to examine the circumstances involved in the gift to O'Sullivan, the Court undertook to consider not only the evidence offered by the parties, but also what might have come into evidence despite any deficiencies in the form or substance of presentation of evidence by Contestants' counsel or what might have been presented if Contestants' original counsel had been more adept.

This court agrees with Contestants that, in order to prevail, O'Sullivan was required to rebut the presumption by no less than "clear and satisfactory" or by "clear and convincing" evidence. Though there is some uncertainty whether the legal standard requires O'Sullivan to produce "satisfactory" or "convincing" evidence, the distinction, if any, is of no import [sic] here, since the Court concludes that O'Sullivan offered evidence which rebutted the presumption under either standard, and in fact did so to the even higher standard of "beyond a reasonable doubt."

b. Evidence offered by O'Sullivan rebutted the presumption of fraud and/or undue influence.

Despite Contestants' objection to the relevance of such evidence, the Court considered the detailed evidence of the McHenrys' testamentary plan, the McHenrys' attentiveness to their estate planning, and the consistency of the plan over the years to be probative of the question whether McHenry intentionally made the residuary bequest to O'Sullivan, or whether the bequest was the result of fraud or undue influence by O'Sullivan, or mistake by McHenry.

The longstanding consistency and attentiveness demonstrated by the McHenrys toward disposition of their estate generally, and in particular to disposition of the residue of their estate, is considered by the Court to be highly probative of McHenry's intent in making the Will of Codicil. O'Sullivan's unrebutted testimony that he exercised no influence as to the amount or type of gift

McHenry proposed to make to any individual, including O'Sullivan, was believed and was corroborated by evidence offered of the McHenrys' own detailed care in the instructions, both oral and written that they gave him each time they revised their estate plan. The disposition of the residue appears consistently to have been the result of the McHenrys' wishes, and according to their instructions.

Contestants have observed, and O'Sullivan admitted, that no continued discussion of the conflict of interest issues accompanied the making of McHenry's 1984 Will or 1985 Codicil, and there was no written expression of McHenrys' recognition of the appropriateness of seeking other counsel in light of the bequest to O'Sullivan when the Will or Codicil were made. Written evidence of such recognition by McHenry would have rendered O'Sullivan's showing that there was not undue influence, fraud or mistake in the making of the Will and Codicil even more compelling. However, the absence of a written acknowledgment by McHenry does not itself require a finding that there was undue influence, fraud or mistake in the making of the Will and Codicil, in light of the overwhelming evidence that the bequest to O'Sullivan was not the result of undue influence or fraud by him, but rather the result of McHenry's own intentions.

Evidence that the bequests to O'Sullivan and Lynch were the product of McHenry's own intention, and not the result of an improper act by O'Sullivan, was abundant and persuasive. The consistent practice of the McHenrys over approximately 25 years, involving more than ten wills or codicils, is strong evidence that the bequest was not the result of momentary caprice, or of O'Sullivan's

capitalizing on McHenry's stroke or visual impairment to cause him to effect an unnatural disposition of his property.

O'Sullivan's own testimony (admittedly self-serving but nonetheless believable) indicated no acts of influence by him. There was no evidence offered by any witness, including those who purported to have been with McHenry on the day the Will was signed, as well as witnesses who were with McHenry on a daily basis, that there was any act (as opposed to opportunity) of undue influence or fraud exercised on McHenry at any time by O'Sullivan or Lynch.

c. There was no presumption of undue influence against Lynch.

There was no evidence introduced which would raise a presumption of undue influence or fraud by Lynch against McHenry. The Contestants did not suggest in their separate trial statement filed with this court that any presumption of fraud or undue influence existed against Lynch, but they suggested that possibility in their request for statement of decision. Even if there were such a presumption, it was rebutted by evidence beyond a reasonable doubt.

d. Contestants' evidence was unconvincing and often illogical.

During the trial Contestants repeatedly attempted to offer evidence not pertinent to the issues of fraud or undue influence. The Court received substantial evidence

offered by Contestants of doubtful or extremely remote relevance to the issues, and none that was persuasive in any way.

1. Marvin Testimony

The offer of proof by Mr. Jeffers on the testimony of witness Howard Marvin ("Marvin") was an illustration in point. On several occasions, the Court requested an offer of proof for the factual basis of Marvin's testimony. Not a single relevant fact was offered. From the Court's perspective, required as it was to speculate about the potential relevance of Mr. Marvin's testimony, it appeared that the only way in which the proffered testimony might have been relevant would be if Marvin were offered to testify that he had participated in a conspiracy, in return for O'Sullivan's including him in McHenry's Will for a bequest of $100,000 in bonds. There was no such offer of proof.

In fact, when Mr. Jeffers made the "offer of proof" regarding the Marvin testimony, it bore no relevance to the issues of fraud or undue influence; the proffered testimony was that, instead of getting the $100,000 bond set forth in the Will, he, instead, actually received twenty $5,000 bearer bonds from the estate. How this was relevant in any manner to show that Lynch and/or O'Sullivan engaged in a conspiracy or fraud or undue influence on McHenry escapes this Court.

The Court was also told that Marvin would testify as to some of the "tricks" that O'Sullivan might have pulled off as a conspiracy. However, despite repeated requests

from the Court, not one single fact probative of such impropriety by O'Sullivan was forthcoming as an offer of proof. Finally, it was indicated that Marvin, who had been close to McHenry, would testify that McHenry would have remembered other friends. The court notes that McHenry did in fact make 27 specific bequests in the 1984 will, in addition to the residuary and other bequests to O'Sullivan and Lynch. Aside from the statement that Marvin would testify that McHenry would have made other bequests, no factual basis for his purported testimony was shown.

2. The Living Trust

One additional matter for which Marvin's testimony was offered was the matter of the 1975 McHenry living trust. Marvin, it was said, would have testified that McHenry had wanted a trust, that it took some time to get O'Sullivan to prepare one for him, and that McHenry thought he had the trust late in his life.

Over O'Sullivan's objection, the Court received evidence relating to the trust, and the trust instrument itself in evidence. Based on the court's independent review, the trust was virtually a bank account in a living trust name. The terms of the trust put the trust property right back into the estate for testamentary disposition, and disposed of the property in accordance with the terms of the McHenrys' wills. The evidence relating to the trust, including the proffered testimony of Marvin relating to same, was a red-herring, as it indicated no fraud in connection with testamentary disposition of the McHenrys' property.

Had the trust, set up in 1975, nine years before the Will, made conveyances of property for the benefit of third parties, or some other disposition, then maybe there could have been a claim that McHenry did not know what was in his estate. Regardless, even if McHenry thought that all of his properties were distributed through his living trust, the testamentary outcome would have been precisely the same.

e. Evidence intended to prove that McHenry signed a will, believing it to be divorce papers was not credible.

At the trial, counsel for contestants attempted to offer evidence for the avowed purpose of proving that on May 23, 1984, when McHenry signed a will in the presence of Lynch, O'Sullivan and a "woman from O'Sullivan's office", he thought he was signing divorce papers. None of the witnesses offered to support that theory provided any foundation for the conclusion Contestants wanted the Court to reach. In any case, as discussed in following sections, testimony of Contestants' witnesses concerning the events that purportedly occurred on May 23, 1984 at McHenry's residence was not believed by the Court.

Besides the weakness of the evidence, the premise that McHenry signed a will when he thought he was signing divorce papers, was highly suspect. Though this action had been pending for more than five years, and though the Contestants had long been familiar with the witnesses offered to support their theory, such premise was not mentioned by Contestants in discovery, and, indeed, did not emerge until the time of trial.

It is apparent to the court that, in this connection, Mr. Jeffers made up the trial as he went along. Mr. Jeffers' statement that, after five years he had just realized that O'Sullivan had slipped a will in amongst divorce papers was nonsensical and symptomatic of the bad faith that was demonstrated in the manner in which Mr. Jeffers conducted this trial. Not only were Contestants trying to conduct a trial by ambush, which the Court would not to [sic] permit, but the premise itself was too raw for this Court to accept. Mr. Jeffers' explanation that he had not had time in the last five years to investigate this matter and that the theory "came together" recently, in light of the longstanding focus of the parties on the events of May 23, 1984, was not credible and cast further doubt on this evidence.

The Court wishes to emphasize that it's comments upon the actions of Contestant's original counsel are made only to indicate the lack of substance to the basic factual foundation of the allegations and not upon the actions of counsel, per se.

f. Proof of conspiracy, fraud or undue influence involving Lynch.

The evidence of fraud or undue influence on the part of Lynch was completely lacking and utterly unconvincing. Based on the evidence, there was no reason for Lynch to have been involved in a conspiracy or fraud with O'Sullivan. Lynch was at least a 50 percent participant in the residue in the McHenry wills ever since 1975. There is no way to explain why Lynch would have helped O'Sullivan procure the 1984 Will, if he already had 50 percent

or more of the residue. In fact, it appears as though Lynch received less in the 1984 Will than he would have under previous wills. It is not credible that Lynch would conspire with O'Sullivan to procure the 1984 Will under those circumstances, and no evidence was offered to explain what his motive might have been.

The only rational explanation might have been that Lynch did not know that he was already a major beneficiary of the McHenry estate, and he thought that a conspiracy with O'Sullivan was the only way to get something. This is merely conjecture and speculation on the part of the Court and in fact appears extremely unlikely. O'Sullivan, also already a 50 percent beneficiary of the estate himself under the 1981 will, and knowing of it, likewise does not appear to have had reason to conspire with Lynch to obtain a new will that made, among other things, a new $500,000 gift to an individual who had been mentioned in the 1981 will for a relatively minor gift of personal property.

If Lynch were a co-conspirator, in what overt act did he engage? The only testimony offered at trial that could have been construed as an overt act was his averred presence at the purported signing of the Will. Contestants attempted to prove this "fact" with the testimony of witnesses Terry Gillard and Ruth Huddleston. Both Terry Gillard and Ruth Huddleston testified that they overheard O'Sullivan telling McHenry that he could not get jewelry back from Ruth Tullis. Neither witness was credible as to the date of this conversation, and the witnesses contradicted each other as to who was present. There was no testimony that a will was shuffled among divorce papers that McHenry was signing.

Gillard was completely discredited at that part of his testimony where he would have had the Court believe that he recognized May 23, 1984 as a date that Lynch was present in McHenry's residence with O'Sullivan. Gillard did not know when McHenry had come home from the hospital; he denied having reviewed the Will to have known the date; and he refused to say how he was sure of events on a specific date, more than eight years in the past. Though Gillard denied that he got the May 23, 1984 date from Mr. Jeffers, the Court was convinced by Gillard's testimony and demeanor that he was not truthful, that he was coached and he was denying it.

The other witness who testified that Lynch was present the date the Will was signed, nurse Rita Huddleston, was also not believable as to her recollection of May 23, 1984 as a particular date on which O'Sullivan and Lynch were present at McHenry's residence. Her recollection appeared to be based only on having reviewed the Will, shown to her by Mr. Jeffers. It was unclear to the Court that the Will could have in any way "refreshed" her recollection. The Will was not signed by Lynch as a witness, and Huddleston testified that she did not see a will executed, or hear one discussed on the date she recalled Lynch having been present at McHenry's residence. She testified to the effect that Gillard was not present on the day Lynch was present at the residence, which Gillard contradicted. Finally, she was certain, but plainly inaccurate (based upon evidence of the actual temperatures of that date which were submitted by O'Sullivan), in describing May 23, 1984 as an extremely warm day. If, in fact, Lynch witnessed the signing of the Will, then we would have a situation where the two

attesting witnesses have lied about the execution of the Will. Both Juli Holtz and Robert Freeman testified that they were present when the Will was executed, and that they signed the Will as witnesses. The Court does not find it reasonable, particularly in light of having observed the testimony of witnesses Gillard and Huddleston, to believe that two semi-strangers to O'Sullivan committed perjury for him. Their testimony, even with minor inconsistencies, cannot be reconciled with the testimony of Gillard or Huddleston.

g. Proof of fraud or undue influence by O'Sullivan.

O'Sullivan and Lynch were alleged to have participated together in Contestants' version of the purported activities at the McHenry residence on May 23, 1984. The evidence offered by Contestants is similarly unconvincing as it relates to O'Sullivan. The conduct attributed to O'Sullivan is also illogical in light of the evidence.

For example, even if O'Sullivan did have two witnesses who were amenable to falsely witness a will in 1984, it is entirely unclear what his motive would have been. Why would O'Sullivan have them witness a bogus will in 1984 giving him 50 percent of the residue, when McHenry already had a 1981 will that gave him the 50 percent? In fact, the 1984 Will appears to bequeath O'Sullivan somewhat less than he would have received in the 1981 will by approximately $250,000, which is half of [sic] amount of McHenry's gift to Ruth Tullis in the 1984 Will.

Why would O'Sullivan have made any improper effort to create the 1984 Will when the 1981 will existed?

Though the 1981 will was not before the Court as a testamentary document, it was in evidence, and it appears to have been a completely solid will. It is corroborated by Bernice's writing in her diary, where there are many notations regarding the 1981 will. Putting McHenry aside, it is almost impossible to believe that Bernice would have written the 1981 will without knowing what was in it, as she quite apparently did with respect to the preceding wills going back to 1975, where Lynch was first mentioned. A review of the evidence indicates that Bernice was almost compulsive in charting her daily activities and thoughts. The validity of the wills in which Bernice was involved appears overwhelming although the court has noted them for evidentiary purposes only and is not actually passing upon them as testamentary documents.

The premise that there was a conspiracy is particularly doubtful in light of the 1981 Will. Neither Lynch nor O'Sullivan stood to gain from the 1984 will. Even if the 1984 Will were bogus, it would appear, ironically, that Lynch and O'Sullivan were not done a favor by Contestants' not contesting the 1984 Will timely. They might have been better off tearing up the 1984 Will and probating the 1981 will. (The Court is of course not advocating this action in any situation but is merely expressing a possible claim of the Contestants.) The 1981 will would appear (the presumption as to O'Sullivan aside) to be absent the purported "taints" Contestants complain about in the 1984 Will. Bernice was there, and there are the testators' own written instructions. It appeared that Bernice and McHenry were in good health in 1981. The fact that the 1981 will has not been found does not raise any

real question in the mind of the Court as to its presumed revocation. In light of the 1984 will and 1985 codicil it does not appear to have been much of a priority to retain a will that has been superseded by two new testamentary documents. The absence of the original 1981 will is consistent with the execution of the new will in 1984 and therefore with the actions of McHenry.

O'Sullivan had been writing wills for McHenry since 1960, and there was unrebutted evidence that he was aware of, and had addressed with the McHenrys, the conflict. While not having protected himself by having written waivers by the McHenrys in each instance is hardly a recommended practice, it appears that McHenry would have wanted to have O'Sullivan prepare the Will in any case. More important, based on the McHenrys' longstanding testamentary pattern, O'Sullivan does not appear to this Court to have influenced McHenry to make a gift to him, either properly or improperly.

There was certain evidence of McHenry's intent to leave Gillard a gift of $300,000 which the Court, as said previously, did not find believable. If, in fact, McHenry had told O'Sullivan to include in the Will a bequest to Gillard $300,000, why would O'Sullivan not have done it? He did, after all, include a bequest to Ruth Tullis for $500,000. Why would O'Sullivan have disobeyed this [sic] instructions and not have included the claimed gift to Gillard of $300,000 if he really were instructed to do so; McHenry was still alive, could read the will, or might have had his closest companion Gillard read it for him. The consequences to O'Sullivan were he found not to have followed McHenry's instructions might have been quite serious. There was also the testimony of nurse

Gladys DuBois, who mentioned that in 1986 McHenry said he would "make it up to Gillard", indicating to the Court that McHenry had not made substantial provision for Gillard at that time. The Contestants' premise does not track and the Court has to reject the premise that McHenry really intended to leave Gillard $300,000 in the 1984 Will.

Finally, witnesses offered by Contestants, some of whom (such as Gillard) were close to McHenry on a daily basis during the time of the alleged misconduct by Lynch and O'Sullivan, could not identify any fraud or undue influence by Lynch or O'Sullivan.

3. Conclusion

1. Whether the Will of Shelton A. McHenry, dated May 23, 1984 (the "Will") was procured by fraud and/or undue influence.

For the reasons set forth above, it is the opinion of the Court that the Will was not procured by fraud and/or undue influence. However, the Court is not making a specific finding on this inasmuch as the Court of Appeals has already held that the will itself is valid due to the absence of a jurisdictionally time-valid contest to the order admitting the will to probate.

2. Whether the residuary clause in the Will was procured by fraud and/or undue influence.

For the reasons set forth above, the Court finds that the residuary clause was not procured by fraud and/or undue influence.

3. Whether O'Sullivan adequately rebutted the presumption of undue influence and/or fraud by clear and satisfactory evidence that:

a. The "transadtion" between O'Sullivan and McHenry was fair and equitable.

Though the Court does not consider this question to be even an issue, the Court finds that the "transaction", inasmuch as it reflected the intentions of McHenry and was not the result of undue influence or fraud on O'Sullivan's part, was "fair and equitable".

b. O'Sullivan had taken no advantage of the attorney-client relationship between himself and McHenry.

For the reasons set forth above, the Court finds that O'Sullivan took no advantage whatsoever of the attorney-client relationship between himself and McHenry.

c. O'Sullivan "fully informed McHenry" as to "all matters relative to the execution of the Will". The Court of Appeals has found that O'Sullivan fully informed McHenry as to all matters necessary for the execution of the Will. There is no evidence that O'Sullivan did not inform McHenry of any matter that would be relevant for the execution of a valid will.

4. Whether O'Sullivan and Lynch engaged in a conspiracy to procure the Will and/or the residuary clause contained in the Will through fraud and/or undue influence.

The court finds that there was no evidence of a conspiracy of any kind between Lynch and O'Sullivan. Further, for the reasons set out above, the Court affirmatively

finds that there was no conspiracy of any kind between Lynch and O'Sullivan.

> 5. Whether O'Sullivan's conduct in preparing the Will or the residuary clause affected the validity of the bequest to Lynch.

Inasmuch as the Court finds that the bequest to Lynch reflected McHenry's testamentary intent, the Court finds that O'Sullivan's conduct in preparing the Will or the residuary clause did not affect the validity of the bequest to Lynch.

> 6. Whether a presumption of undue influence or fraud was raised by the conduct of Lynch relative to the preparation of the Will and/or the residuary clause.

Contestants raised the contention that there was a presumption of undue influence imposed on Lynch for the first time in their Request for Statement of Decision. Contestants did not raise such contention in either their Trial Statement nor in argument to the Court. Moreover, Contestants were mute when the Court stated during trial that there was no presumption imposed upon Lynch. Accordingly, the Court finds that Contestants waived the issue of any presumption as to Lynch.

Regardless of such waiver, for the reasons set forth above, the Court finds that there was no believable evidence which raised any presumption of undue influence or fraud as to Lynch, nor was there any believable evidence concerning conduct by Lynch which would have raised such a presumption.

The evidence at trial showed that Lynch was completely segregated from any discussion with McHenry or

O'Sullivan of wills or modifications to wills. For example, when wills were to be executed at the restaurant, Lynch was ordered to leave the office. Any evidence offered by Contestants attempting to connect Lynch to the execution of the Will was not believable, credible or logical.

> 7. If a presumption of fraud or undue influence was raised by the conduct of Lynch, whether Lynch successfully rebutted that presumption.

As noted above, no presumption of undue influence or fraud was raised or created by the conduct of Lynch. However, the Court has reviewed the evidence presented and finds that, if there had been any presumption, Lynch has rebutted it for the reasons set forth above.

In particular, the evidence at trial established that Lynch had no knowledge of the contents of the Will or the Codicil prior to McHenry's death. Lynch had no discussions with O'Sullivan or McHenry as to the contents of the Will and was not present when the Will was executed. The evidence offered by Contestants attempting to connect Lynch to the creation and execution of the Will was not believable, credible or logical.

Moreover, the Court finds that the testamentary intent of McHenry as to his employees exhibited in prior wills is very persuasive. In particular, the Court finds evidence that the manager of the McHenrys' restaurants before Lynch was a 35-percent beneficiary of a residuary clause in a prior will very compelling. Additionally, the testimony of Contestants' own "non-interested" witnesses confirm that McHenry intended to provide a substantial bequest to Lynch.

With respect to Respondents' requests:

> 1. Whether there was fraud or undue influence exercised by O'Sullivan in connection with the Will.

For the reasons set forth above, the Court finds that there was no fraud or undue influence exercised by O'Sullivan in connection with the residuary clause of the Will. For the reasons set forth above at several locations, the Court is not making an express finding as to the entire will, considering that question to be a non-issue for purposes of these proceedings.

> 2. Whether there was fraud or undue influence exercised by Lynch in connection with the Will.

For the reasons set forth above, the Court finds that there was no fraud or undue influence exercised by Lynch in connection with the residuary clause of the Will. The Court again indicates that it is making no express finding as to the entire will for the reasons that have been previously expressed.

> 3. Whether there was fraud or undue influence exercised by O'Sullivan in the making of the Codicil to the Will, which Codicil was dated April 20, 1985 ("Codicil").

For the reasons set forth above, the Court finds that there was no fraud or undue influence exercised by O'Sullivan in connection with the Codicil.

> 4. Whether there was fraud or undue influence exercised by Lynch in the making of the Codicil.

For the reasons set forth above, the Court finds that there was no fraud or undue influence exercised by Lynch in connection with the Codicil.

> 5. Whether there was mistake on the part of McHenry in connection with the making of the Will.

Based upon its *sua sponte* review of the evidence, and its own inquiry, the Court finds that there was no mistake on the part of McHenry in connection with the making of the Will.

> 6. Whether there was mistake on the part of McHenry in connection with the making of the Codicil.

Based upon its *sua sponte* review of the evidence, and its own inquiry, the Court finds that there was no mistake on the part of McHenry in connection with the making of the Codicil.

> 7. Whether the Codicil republished the Will, so as to cure any defect in execution of the Will.

The Court finds that, there being no irregularity in connection with the making of the Codicil, the Codicil republished the Will, so as to cure any defect in execution of the Will.

4. Disposition

The Court can find no evidence in the record whatsoever of any fraud or undue influence. The presumption of fraud and/or undue influence was completely and utterly overcome by O'Sullivan. There was absolutely no affirmative evidence presented that would raise an independent inference or suspicion, let alone proof of fraud, undue influence, or mistake on the part of O'Sullivan

and/or Lynch. There was no evidence of conspiracy between O'Sullivan and Lynch whatsoever.

Judgment for Respondents is to be entered accordingly.

Dated: FEB 16, 1993

/s/ Edward M. Ross
EDWARD M. ROSS
Judge of the Superior Court

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(4)

FILED
DEC 19 1994
OFFICE OF THE CLERK

No. 94-951

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

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Estate of SHELTON A. McHENRY,
Deceased.

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EDWARD S. HALL, et al.,

Petitioners

vs.

THOMAS E. O'SULLIVAN, et al.,

Respondents.

---

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

---

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CALIFORNIA JUSTICE FOUNDATION IN SUPPORT OF PETITIONERS

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---

Petition for Writ of Certiorari
To the California Court of Appeal

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# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF CALIFORNIA JUSTICE FOUNDATION IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37 of this Court, the California Justice Foundation (CJF) respectfully requests leave to file a

brief amicus curiae in support of petitioners.

Counsel for petitioners has consented to the filing of this brief and counsel for respondents have declined consent. The letters from said counsel will be filed with the Supreme Court clerk.

INTEREST OF THE AMICUS CURIAE

The CJF is a non profit membership corporation formed to improve the performance of the legal profession and to improve the administration of justice and the public's confidence in the justice system.

In addition its purpose is to submit briefs as amicus curiae in appellate cases involving signficant issues affecting attorneys' participation in the legal process.

The CJF has participated in numerous cases in the Courts. The CJF conducts seminars and programs to improve the justice system and the administration of justice, as well as the performance of attorneys.

CJF and its members have a strong interest in the development of sound legal principles governing procedural and substantive issues arising from attorneys' participation in the legal system. In particular, CJF is vitally concerned about the questions presented by petitioners regarding the trial court and appellate standards applicable to the situation where an attorney drafted a will making himself a prime beneficiary of a $7 million plus estate of a legally blind and infirm client, under extremely suspicious circumstances, and the standards of the appellate review

of the trial court's decision. Proper review by the appellate courts, under proper criteria, provide critical safeguards in the legal system for the correction of erroneous and unjustified decisions.

Because of the CJF's interest in the outcome of this case, as well as its extensive experience in the proper standards of an attorney's conduct, CJF is able to provide an additional broader perspective on the important issues raised by petitioners.

A broader perspective is particularly important because of the public's low esteem of the legal profession and the need for the public to know that the courts are trying to correct attorneys' overreaching and personal enrichment at the expense of their clients and their estates.

CJF believes that an amicus curiae brief will be of assistance to the Court in considering the petition for a writ of certiorari.

One of the purposes of a brief by CJF is to call to the Court's attention an important issue of denial of due process in the within case by the state court allowing such a matter to be treated so lightly and to treat the case as a short cause matter giving the parties only a few hours for trial; by the court itself not being interested in the complete conduct of the attorney where the petitioners wanted to show evidence of forgery by the attorney; by his not inventorying all of the assets in the estate; by using his position of trust for personal benefit; and the attorney's complete disregard for the honor of the legal profession and its integrity.

For the foregoing reasons, the Motion of the CJF for leave to file a brief amicus curiae in support of petitioners should be granted.

Dated: December 27, 1994.

Respectfully submitted,

John Rakus, Counsel
for California Justice
Foundation

No. 94-951

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PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

# BRIEF AMICUS CURIAE OF CALIFORNIA JUSTICE FOUNDATION IN SUPPORT OF PETITIONERS

## INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion for leave to file this brief.

## STATEMENT OF THE CASE

This case involves a will contest wherein an attorney for a legally blind, infirm client, had the client sign a will soon after the client returned home from the hospital after a lengthy stay, leaving the attorney one-half of the $7 million residue of the estate. The will was not witnessed by disinterested parties, but rather by the law clerk and secretary of the attorney who were directed by the attorney, not by the client.

## PROCEEDINGS IN TRIAL COURT

The complete chronology of facts involving the development of the case, is well provded in the petition for writ of certiorari and need not be repeated here. See Petition at page 3 et seq... Amicus will limit its re-counting to the essential facts related

to the arguments presented by amicus.

## ARGUMENT I

## DUE PROCESS REQUIRES ADEQUATE TIME AND CLOSEST SCRUTINY

Due process requires that there be given adequate time to try a case. The lower court only allowed a few hours for the complete trial, and excluded important evidence which was a denial of due process.

In the first appeal from the granting of a Motion for Summary Judgment, the California Appellate Court sent the case back to the trial court to engage in the "closest scrutiny". In any interpretation of "closest scrutiny" the lower court should have allowed any evidence to show the conduct of the attorney who drafted the will. When the conduct of an attorney is so egregious the court should look into the matter "sua sponte".

The court was not concerned that the attorney had forged the client's initials on the will. The court was not concerned nor would it allow testimony that the attorney and Mr. Lynch went into decedent's safe a few hours after his death, took out an envelope marked "will" and denied its existence.

The Court did not concern itself with the fact that O'Sullivan saved every scrap of note paper, copies of all wills, etc., of the decedent and his predeceased spouse, for years, but yet had nothing to substantiate the 1984 will. On pages 18 and 19 of the Petition, it states:

> "... O'Sullivan claimed he wrote these changes on the 1981 copy -- though, suspiciously, at this critical time O'Sullivan could not locate the copy or any other notes indicating changes."

The court allowed the attorney to testify on his own behalf and gave a lot of credence to his self-serving testimony which should not have been allowed. Estate of Teed (1952) 112 Cal. App. 2d 638, 644. 247 P. 2d 54.

The Court did not discount the fact that the attorney did not inform his client sufficiently about the preparation of the will. In the Will of Tank (1986) 132 Misc. 2d 146, 503 N.Y.S. 2d 495, 496 (commenting on the American Bar Asso ciation's model rule of conduct), the New York court, even though it accepted as true the lawyer's account that it was the testator who made the suggestion, it still held:

> "The lawyer had an ethical duty to further discourage and refuse such a bequest-- particularly when not founded upon any friendship, relationship, or other affection. The very purpose of the .. [sua sponte duty of the court to

> inquire into such wills ("Putnam doctrine" in New York State) is to prevent the inherent wrong of an elderly decedent unduly or inexplicably rewarding those upon whom...[the decedent] becomes dependent, such as doctors, nurses, clergymen, lawyers, etc., ...Id., at 498."

Holding the lawyer's acceptance of the gift improper, the Tank court stated that only the court's firmness in rectifying the situation can maintain the public confidence in lawyers and other professions. Ibid.

See also the Matter of Delovey (1988) 141 A.D. 2d 540, 529 N.Y.S. 2d 153.

PROTECTING THE PUBLIC

Executors and beneficiaries were failing to pay creditors and hiding behind the short claims statues which shortened the statute of limitations on

filing claims against estates until this court acted in the case of Tulsa et al., v. Pope. 485 U. S. 478, 491, and ruled that notice must be given to all reasonably ascertainable creditors and they must have a reasonable time to file their claims. This court cleared up conflicting rules throughout the United States and protected the creditors. It is a landmark case and followed by all of the probate courts throughout the United States.

By hearing the Petition for Certiorari presented by petitioners, it is asking nothing more than protection for the public against such conduct of attorneys who have a chance to line their pockets by taking advantage of their clients when drafting wills or living

trusts. When we are talking about millions as opposed to a token amount it becomes extremely serious and this court should take an active part in getting rid of this abuse and protect the public. There must be a uniformity of treatment in following the rules of "due process."

In California, and in one particular matter involving an attorney in Orange County by the name of Attorney Gunderson, it was the news media that exposed the conduct of this attorney, and only after this did the courts and the Bar Court become involved.

Exposure of the conduct of the attorney in the case here, should have been allowed by the lower court through documentary and oral testimony, but it would not do so. The

only means by which the public can then be protected is through this Court.

## ARGUMENT II

### DUE PROCESS SHOULD REQUIRE THE APPELLATE COURT TO USE THE STANDARD OF CLEAR AND CONVINCING EVIDENCE EXCLUDING TESTIMONY OF ATTORNEY

The California Appellate Court set forth the standard of review as follows:

> "The standard of review on appeal is well settled. ' "The question whether the evidence adduced by a party who has the burden of proof carries the required weight is for the trier of fact and the court of review."' (Estate of Gelonese (1974) 36 Cal. App. 3d 854, 863.) This means that the trial court's finding that the presumption of undue influence was rebutted may not be disturbed on appeal if there is substantial evidence to support it. (ID. at pp. 966-967; Estate of Clegg (1978) 87 Cal. App. 3d 594, 600.) All conflicts in evidence must be resolved in favor of the respondents, and all legitimate and reasonable

> inferences must be indulged to uphold the judgment if possible. Ibid.)

Due process requires there be a higher standard of review. It should be clear and convincing evidence and exclude the testimony of the attorney who drafted the will and inheriting millions.

Due process should require that the bequest to the attorney be void on its face unless the will was drafted by an independent attorney.

There are no longer jury trials for will contests in California, so the case hinges on the trial courts' interpretation so there is no effective review. The case of Honda v. Oberg, 114 S. Ct. 2331 (1994) is a recent development in the law to provide the appellate court with authority and guidelines for following "due process", as required by the 14th amendment.

There should not be one rule in New York and one rule in California. There must be a uniform rule applied to attorneys drafting wills.

## CONCLUSION

For the foregoing reasons, amicus respectfully urges this Court to grant the petition for writ of certiorari.

DATED: December 27, 1994

Respectfully submitted,

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No. 94-951

In The

# Supreme Court of the United States

October Term, 1994

IN RE ESTATE OF SHELTON A. McHENRY, *Deceased.*

EDWARD S. HALL, *et al.*,

*Petitioners,*

vs.

THOMAS E. O'SULLIVAN, *et al.*,

*Respondents.*

On Petition For Writ Of Certiorari
To The California Court Of Appeals

## OBJECTION TO MOTION OF THE CALIFORNIA JUSTICE FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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## STATEMENT OF REASONS FOR WITHHOLDING CONSENT TO FILING OF *AMICUS CURIAE* BRIEF

On December 20, 1994, counsel for Respondent Thomas E. O'Sullivan received a written request from the self-styled "California Justice Foundation" for O'Sullivan's consent to the filing of an *amicus curiae* brief in this matter. Counsel for O'Sullivan, not having heard before of the Foundation, promptly wrote by facsimile transmission to the Foundation respectfully requesting an explanation of its interest in this case, and a description of its familiarity with the record in the underlying proceedings.

No reply to the request was received by O'Sullivan's counsel before the time for filing the briefs in opposition to the Petition for Writ of Certiorari had passed, and no indication whatever has been given by the Foundation of any familiarity with the record below. Because the entity was unknown, its interest was unarticulated and because the Foundation had no known understanding of the record, counsel for O'Sullivan declined to consent to the filing of a brief by the Foundation.

O'Sullivan's caution in giving consent for the Foundation to file an *amicus curiae* brief appears to have been judicious. Purporting to apply "extensive experience in the proper standards of an attorney's conduct," the Foundation, ironically, indulges even more than Petitioners already have either in distorting, or plainly ignoring, the record below. Moreover, rather than raise any Constitutional issue, the Foundation merely argues, in substance, that this Court should determine that New York law, which is construed by the Foundation as friendly to Petitioners' cause, should

apply in California courts in matters involving transactions between attorneys and their clients.

Little is known to Respondent O'Sullivan about the California Justice Foundation, or about its real ends in seeking leave to file its brief. Belying any objectivity about the facts and ignorance of the record, it seeks leave to file the brief in a style curiously reminiscent of that of trial counsel below, referencing "evidence," already considered and judged by the trial court to have been "made up" or otherwise unreliable.

As an example, the Foundation refers alluringly to the "legally blind" McHenry (Motion, pp. 3 and 8). The trial court, however, found based on the testimony of Petitioners' own expert witness that McHenry was not legally blind, and was able to read print smaller than the type in the Foundation's motion (Opp. Brief[1], p. App. 22). Likewise, the Foundation refers to the action having been treated as a "short cause matter" in which the parties were given "a few hours" for trial despite the fact that the trial occurred over a period of five days (Opp. Brief, p. App. 12) in front of a judge well-familiar with the matter. This type of misconstruction of the record in the Motion and in the proffered brief is epidemic.

The Foundation's assumption that the lawyer's conduct in this action was "treated lightly" is strongly rebutted by the record, of a trial on the merits and multiple appeals, already before this Court. The premise appears in reality to be nothing more than an excuse for the

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[1] Brief of Respondent Thomas E. O'Sullivan in Opposition to Petition for Writ of Certiorari.

Foundation to repeat Petitioners' titillating fragments of "evidence" which they wish the trial court had believed.

Though the merits of the Foundation's proposed brief are not the issue here, it should be observed that the kind of liberties taken by the Foundation in construing the record seem to be indicative of the legal analysis urged on the Court. The Foundation utterly misconstrues the scarce California case law on which it relies.[2] The Foundation then posits that this Court should require California to adopt New York, rather than its own, law as its standard in reviewing the trial court's findings about the conduct of a California lawyer.

At the crux of the Foundation's position, however, is the idea that the Due Process clause of the Fourteenth Amendment of the Constitution requires this Court to create a uniform rule among the States prohibiting members of their respective state bars from inheriting under wills prepared by them. It is not the province of the Federal courts to choose among the laws of the States regarding wills, trusts and estates.

The Foundation also argues that a higher standard of review should apply in cases such as this, misapprehending existing California law, which provides that the appellate court review the evidence in light of the burden

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[2] See, e.g. the Foundation's citation to *Estate of Teed*, 112 Cal. App. 2d 638, 247 P. 2d 54 (1952) (Motion, p. 11), apparently for the premise that it is improper for a lawyer to be believed when testifying in his or her own behalf. *Teed*, in fact, dealt with the question of a decedent's testamentary capacity. It did not involve a lawyer's credibility in any way, and does not appear to support the premise for which it is cited in any way.

of proof applicable at the trial level, whether that burden is one of "clear and convincing," or a "preponderance of evidence," or some other burden. Thus, as discussed in O'Sullivan's Opposition Brief, the California courts are required to, and in this case explicitly did, assess the evidence in light of an already strict standard.

Finally, the Foundation argues without authority or a rationale, that the testimony of the lawyer who drafted the will should be excluded, or the gift should be declared void *ab initio* in order to afford due process. This argument leads toward the proposition that in any transaction in which a lawyer has a pecuniary interest, he should be irrebuttably presumed to have behaved unethically. Ironically, were such a presumption to have been applied in the case at bar, it might be the lawyer in front of this Court legitimately complaining of denial of due process.

In this matter, under the applicable California law, O'Sullivan was properly burdened by a legal presumption of the presence of undue influence in the preparation of the will, allowing the Petitioner will contestants to proceed to trial in the absence of any evidence of wrongdoing on the attorney's part. Surely, any notion of "due process" would afford even a lawyer the opportunity to prove, as was the case here, the existence of the unusual circumstances which rendered the gift proper.

It is respectfully submitted that the input of a palpably poorly informed third-party, however well-intentioned the Foundation purports to be, would be of no assistance to the Court in evaluating the issues presented by Petitioners.

## CONCLUSION

The Foundation clearly buys into the negative public perception of lawyers. Without having done its homework, the Foundation asks the Court to assume without any support in fact, that a lawyer has acted unethically. If the Foundation had read the trial transcript and reviewed the record of the multiple appeals, it would have seen that the trial and appellate Courts were circumspect in adhering to strict standards of proof and review. It is respectfully submitted that this Court should no sooner rely on a distorted rendition of the underlying facts to permit the filing of an *amicus curaie* brief than it should so rely to grant Certiorari, and that the Foundation's motion should be denied.

Dated: January 6, 1995

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